

STATE OF MICHIGAN
IN THE SUPREME COURT

Appeal from the Michigan Court of Appeals
Hon. Kurtis T. Wilder, Presiding Judge

MAJESTIC GOLF, LLC, a Michigan limited
liability company,

Plaintiff/Counter-Defendant/
Appellee,

v

LAKE WALDEN COUNTRY CLUB, INC., a
Michigan Corporation,
Defendant/Counter-Plaintiff/
Appellant.

Supreme Court No. 145988

Court of Appeals No. 300140
Livingston County Circuit Court No.
09-24146-CZ

**HOME BUILDERS ASSOCIATION OF MICHIGAN'S
BRIEF AMICUS CURIAE IN SUPPORT OF THE POSITION ON APPEAL OF
DEFENDANT/COUNTER-PLAINTIFF/APPELLANT,
LAKE WALDEN COUNTRY CLUB, INC.**

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**STATEMENT IDENTIFYING
ORDER APPEALED FROM AND RELIEF SOUGHT**

Amicus Curiae, Home Builders Association of Michigan, states that this Court has jurisdiction pursuant to MCR 7.301(A)(2) and MCR 7.302, an Application for Leave to Appeal (the "Application") from the August 30, 2012 Order Denying Motion for Reconsideration of the July 10, 2012 Opinion of the Michigan Court of Appeals (the "COA Opinion") having been timely filed on October 10, 2012 and granted on April 3, 2013. For the reasons discussed below, the COA Opinion should be reversed and the decision of the Circuit Court reinstated.

STATEMENT OF QUESTIONS PRESENTED

- I. DID THE COURT OF APPEALS ERR BY FAILING TO HARMONIZE THE LAW OF CONTRACTS AND REAL PROPERTY AND APPLY THE MATERIAL BREACH DOCTRINE CONSISTENT WITH MICHIGAN'S COMMON LAW?

The Court of Appeals answered, "No."

The Circuit Court answered, "Yes."

Defendant/Appellant answers, "Yes."

Plaintiff/Appellee answers, "No."

Amicus Curiae, Home Builders Association of Michigan answers, "Yes."

- II. DO PUBLIC POLICY CONCERNS WEIGH IN FAVOR OF REVERSING THE COURT OF APPEALS OPINION?

The Court of Appeals answered, "No."

The Circuit Court answered, "Yes."

Defendant/Appellant answers, "Yes."

Plaintiff/Appellee answers, "No."

Amicus Curiae, Home Builders Association of Michigan answers, "Yes."

I. INTRODUCTION AND STATEMENT OF INTEREST

The Home Builders Association of Michigan ("Association") is a statewide association whose members develop and build single and multi-family homes throughout Michigan. One of the primary goals of the Association is to provide the opportunity for all Michigan residents to own or rent affordable housing. To promote this goal and others, the Association seeks to oppose laws and court decisions which delay, restrict or otherwise impede the ability of the Association's members to construct affordable housing in Michigan.

At issue in this appeal is the application of the material breach doctrine to contracts formed in Michigan. The Circuit Court applied the material breach doctrine to find that although Appellant, Lake Walden Country Club ("LWCC") may have technically breached the parties' lease, the breach was not material such as would warrant a forfeiture. The Court of Appeals, in a published opinion, reversed, finding that the material breach doctrine was not a term of the parties' lease and, therefore, could not be used to defeat the forfeiture action brought by Appellee, Majestic Golf, LLC ("Majestic"). The Opinion of the Court of Appeals potentially allows parties to terminate agreements, including building contracts, for trivial or non-material breaches. The Association opposes this result.

In addition, the strict enforcement of forfeiture clauses in contracts (e.g., leases, purchase agreements, building contracts) discourages real estate investment and thus, real estate development. The Association opposes this result as well.

The implications of the COA Opinion, and the issues raised by that opinion, are important to Association members. In *City of Grand Rapids v Consumers Power Co*, 216 Mich 409, 415; 185 NW 852 (1921), this Court stated: "This Court is always desirous of

having all the light it may have on the questions before it. In cases involving questions of important public interest, leave is generally granted to file a brief as amicus curiae” The Association believes that this is a case of important public interest, and the outcome of this case is of continued and vital concern to the Association and its members. The Association’s experience and expertise could be beneficial to this Court in the resolution of the issues presented by this appeal. Accordingly, the Association seeks leave to file a Brief Amicus Curiae in support of LWCC.

II. STATEMENT OF MATERIAL FACTS AND PROCEEDINGS

The Association generally accepts the Statement of Facts contained in Defendant/Appellant’s Brief on Appeal, as highlighted by the following:

1. Beginning in 1992, LWCC leased land (approximately 342 acres) from Majestic (the “Leased Premises”).
2. From 1992 to 1995, LWCC constructed a 27-hole golf course, clubhouse, and related facilities (the “Golf Facility”) on the Leased Premises at its own cost of more than \$6 million.
3. From 1992 to present, LWCC has timely paid Majestic over \$1.6 million in rent and has paid all property taxes, maintenance and repair costs, all utility bills, and all insurance costs.
4. The term of the parties’ “Lease” is 25 years with an option for LWCC to purchase the Golf Facility, exercisable at any time during the final 10 years of the Lease term (the “Option”).

5. The land surrounding the Leased Premises is owned by the sole member of Majestic, Waldenwoods Properties, LLC ("Waldenwoods").

6. At the time that the Lease was signed in 1992, it was anticipated that Waldenwoods would develop single-family homes on the property surrounding the Leased Premises which would complement the Golf Facility and vice-versa. Waldenwoods has never started this contemplated development.

7. Beginning in March of 2003, representatives of LWCC and Majestic began discussing a merger of the two entities. A merger had appeal to both parties since a merger of the two entities would avoid LWCC's exercise of the Option which would, in turn, avoid a potentially contentious valuation of the Property.

8. During the course of the merger negotiations, Majestic first requested an easement from LWCC. An initial draft of an "Easement Agreement" was provided by Majestic in April 2007 and revised by Majestic in November 2007. Thereafter, in December 2007, the first set of merger documents were drafted incorporating the Easement Agreement as one of the many documents to be delivered upon the closing of the merger. The reference to the Easement Agreement as an exhibit to the merger document continued throughout all subsequent drafts of the merger documents, including the drafts from Majestic. Merger negotiations continued until November 2008.

9. On October 7, 2008, Majestic sent a letter to LWCC enclosing its draft of the Easement Agreement, unchanged in any substantive way from its earlier versions, and requesting LWCC's consent to the Easement Agreement. The next day, on October 8, 2008,

Majestic again requested that LWCC agree to its Easement Agreement. Yet, on October 13, 2008, Majestic sent LWCC a lengthy letter in which “problems” with the parties’ merger negotiations (specifically, LWCC’s refusal to grant Waldenwoods the unfettered right to cut trees on the Golf Course) were discussed at length – without any mention of the Easement Agreement.

10. On November 24, 2008, Majestic, through its attorney, sent a letter to LWCC’s President enclosing a form Notice to Quit – Termination of Tenancy indicating that LWCC must move out of the Golf Facility by December 24, 2008. Majestic’s counsel advised that LWCC had defaulted under paragraph 26(D) of the Lease by reason of its failure to execute and deliver the Easement Agreement which had been sent to LWCC on October 6 [sic], 2008.¹

11. LWCC responded through its counsel on December 11, 2008 advising Majestic’s counsel that there had been no default under the Lease for the reasons that: (1) the Easement Agreement (specifically, the timing thereof) was not being negotiated under the Lease but, rather, in the context of the merger – which had obviously not yet occurred; (2) the parties had not reached an agreement as to the terms of the Easement Agreement; and (3) Majestic had not provided LWCC with a 30-day default notice to cure as required by the “Notice Provision” of the Lease. LWCC’s counsel also provided a copy of the Easement Agreement to which LWCC would agree. **Ultimately, on June 16, 2010, an “agreed upon” Easement Agreement was recorded with the Livingston County Register of Deeds.**

¹ The actual date of the letter is October 7, 2008. This letter will hereafter be referred to by its correct date.

12. On December 22, 2008, LWCC provided notice to Majestic of LWCC's exercise of the Option under paragraph 17 of the Lease. In response, Majestic filed this lawsuit.

13. In ruling on cross-motions for summary disposition, the Circuit Court found that LWCC's failure to provide the Easement Agreement within 30 days of the October 7, 2008 letter from Majestic to LWCC constituted a breach of the Lease. Trial Court Opinion ("Tr Ct Op"), 12/23/09, pp 4-5, Exhibit A. However, the Circuit Court further found that while LWCC committed a technical breach of the Lease, that breach did not rise to the level of a material breach which would permit Majestic to terminate the Lease and, by consequence, LWCC's Option. Tr Ct Op, 12/23/09, pp 5-6, Exhibit A.

14. Majestic filed a Motion for Reconsideration, which the Circuit Court denied. Trial Court Opinion on Reconsideration ("Tr Ct Op on Recon"), 3/30/10, p 3, Exhibit B.

15. The Court of Appeals reversed, finding that unambiguous contracts must be enforced as written, that the material breach doctrine was not a term of the Lease, and the Circuit Court erred by failing to enforce the forfeiture provision of the Lease based on LWCC's breach not being a "material breach." The Court of Appeals Opinion ("COA Op") is attached as Exhibit C.

III. ARGUMENT

Standard Of Review – This Court reviews de novo a trial court's grant or denial of summary disposition. *Brunsell v Zeeland*, 467 Mich 293, 295; 651 NW2d 388 (2002). The interpretation of a contract is also reviewed de novo. *Schmalfeldt v North Pointe Ins Co*, 469 Mich 422, 426; 670 NW2d 651 (2003).

A. Michigan's Common Law Includes The Material Breach Doctrine

The material breach doctrine, as stated in the Restatement (First) of Contracts, §275, published in 1932, has been adopted in many jurisdictions, including Michigan. In 1957 in *Walker & Co v Harrison*, 347 Mich 630; 81 NW2d 352 (1957), this Court concluded that the breach at issue was not material such that repudiation of the lease was permitted. *Walker*, 347 Mich at 636. The criterion adopted by this Court "for determining whether or not a breach of contract is so fatal to the undertaking of the parties that it be classed as 'material'" are verbatim from the Restatement.

In determining the materiality of a failure fully to perform a promise the following circumstances are influential:

- (a) The extent to which the injured party will obtain the substantial benefit which he could have reasonably anticipated;
- (b) The extent to which the injured party may be adequately compensated in damages for lack of complete performance;
- (c) The extent to which the party failing to perform has already partly performed or made preparations for performance;
- (d) The greater or less hardship on the party failing to perform in terminating the contract;
- (e) The wilful, negligent or innocent behavior of the party failing to perform;
- (f) The greater or less uncertainty that the party failing to perform will perform the remainder of the contract.

Walker, 347 Mich at 635, citing Restatement (First) of Contracts, §275. These criteria are still used today. See, *Holtzlander v Brownell*, 182 Mich App 716, 721-722; 453 NW2d 295 (1990)

(“In order to warrant rescission, there must be a material breach affecting a substantial or essential part of the contract.”); *Omnicom of Michigan v Giannetti Inv Co*, 221 Mich App 341, 348; 561 NW2d 138 (1997) (“In determining whether a breach is material, the court should consider whether the nonbreaching party obtained the benefit it reasonably expected to receive. Other considerations include the extent to which the injured party may be adequately compensated for damages for lack of complete performance, the extent to which the breaching party has partly performed, the comparative hardship on the breaching party in terminating the contract, the wilfulness of the breaching party’s conduct, and the greater or lesser uncertainty that the party failing to perform will perform the remainder of the contract.”).

Appellee argued below that the material breach doctrine does not apply here because the case law discussed above involves the equitable remedy of rescission – not the equitable remedy of forfeiture. However, no Michigan Court has expressly addressed the application of *Walker* and the material breach doctrine to a forfeiture claim, save the Court of Appeals in one unpublished decision – *Geno Enterprises, Inc v Newstar Energy USA, Inc*, unpublished opinion per curiam of the Court of Appeals, issued June 5, 2003 (Docket No. 232777) – in which the Court *applied* the material breach doctrine. A copy of the *Geno Enterprises* opinion is attached as Exhibit D. Certainly, no Michigan Court has refused to apply the material breach doctrine simply because the case involved a forfeiture claim rather than a rescission claim.

This Court, as the “principal steward of the common law,” is empowered by the constitution to change, modify, alter, develop and extend the common law consistent with

public policy. *Henry v Dow Chemical Co*, 473 Mich 63, 83; 701 NW2d 684 (2005); see also, *Berger v Weber*, 411 Mich 1; 303 NW2d 424 (1981). Michigan's common law allows for the equitable defense of material breach in rescission cases. Michigan's common law is undecided on the application of the equitable defense of material breach in forfeiture cases. As discussed below, sound legal and policy reasons exist for this Court to "bridge this seemingly unintentional gap" in Michigan's common law so as to allow for the equitable defense of the material breach in both rescission and forfeiture cases. Such a result requires no "capricious departures from bedrock legal rules." *Price v High Pointe Oil Co, Inc*, 493 Mich 238, 259; 828 NW2d 660 (2013), citing *Young*, A Judicial Traditionalist Confronts the Common Law, 8 Texas Rev L & Pol 299, 307 (2004). To the contrary, such an incremental alteration to the common law is consistent with "bedrock legal rules" and public policy.

B. The Material Breach Doctrine, and Its Application to Forfeiture Cases, Can be Harmonized with the Enforcement of Unambiguous Contracts, As Written

The Court of Appeals did not discuss this Court's decision in *Walker* (or any case discussing the material breach doctrine) but, instead, relied almost exclusively on this Court's opinions in *Rory v Continental Ins Co*, 473 Mich 457; 703 NW2d 23 (2005) and *Wilkie v Auto-Owners Ins Co*, 469 Mich 41; 664 NW2d 776 (2003) for its rulings that:

1. "material" breach is not a term of the parties' lease,
2. courts must enforce the plain and unambiguous terms of contracts as written,
3. including forfeiture clauses in commercial leases,
4. except where

- a) the contract violates the law or public policy;
 - b) traditional contract defenses apply; or
 - c) exceptional circumstances,
5. without regard for any equitable considerations, including the material breach doctrine.

However, neither *Rory* nor *Wilkie*, both insurance contract interpretation cases, mandate ruling five above. In fact, because *Rory* and *Wilkie* were insurance contract interpretation cases and not forfeiture cases, this Court did not have occasion, in either of those decisions, to speak to ruling five above.² Nor did this Court have the opportunity to discuss what is really at the heart of this case – a balance between contract and real property law. This Court may do so now.

At first blush, this case may appear to create tension between two very basic, yet foundational, tenets of Michigan contract and real property law upon which this Court has repeatedly spoken:

Contracts should be enforced as written	vs	Forfeitures of real property interests ³ are not favored
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Rory, 473 Mich at 457; *Negaunee Iron Co v Iron Cliffs Co*, 134 Mich 264, 275; 96 NW 468 (1903). A thorough analysis, however, reveals that application of the material breach doctrine provides an accord (not tension) between contract and real property law.

² Indeed, a lease, unlike an insurance contract, is not specifically regulated such that there is any concern here that the jurisdiction of the Insurance Commission would be improperly invaded by applying equitable principles. In this sense, *Rory* and *Wilkie* are distinguishable.

³ Leases are interests in real property. *Adams Outdoor Advertising v City of East Lansing*, 463 Mich 17, 34; 614 NW2d 634 (2000), citing *Fidelity Trust Co v Wayne Co*, 244 Mich 182; 221 NW 111 (1928).

Real property is unique in character and quality and is, therefore, somewhat predisposed to equitable relief and defenses. *In re Smith Trust*, 480 Mich 19; 745 NW2d 754 (2009). Contract law is also accommodating of equitable relief and defenses. The goal should be to balance the interplay between contract and real property law.

The drafters of the Restatement (Second) of Property note that the law of the late twentieth century contains a still-shifting balance of property and contract concepts, with neither clearly in control. Restatement, Introduction at 4. They opine that to the extent both concepts aid in fashioning the most realistic and equitable relationships possible, it is likely that such a mixture will remain. *Id.* We thus find the rule that pertains to contracts in general regarding this issue is helpful in defining the rights of the parties in the landlord-tenant context. See *Cimina v Bronich*, 349 Pa Super 399, 503 A2d 427 (1985), rev'd on other grounds, 517 Pa 378, 537 A2d 1355 (1988) (applying similar test to determine whether lease breach was material).

Foundation Dev Corp v Loehmann's, Inc., 163 Ariz 438; 788 P2d 1189, 1197, n 13 (Ariz 1990) (adopting the material breach doctrine from the Restatement (Second) of Contracts, §241 in commercial lease forfeiture cases).

1. The Material Breach Doctrine Is a Legal Doctrine, Implied In Real Estate Contracts

The positions taken by Majestic and the Court of Appeals require the automatic forfeiture of real property interests upon declaration of a breach of one of any number of the terms of the parties' contract – no matter how trivial – unless:

1. the contract violates the law or public policy; or
2. one of the five "traditional contract defenses" (specifically, duress, waiver, estoppel, fraud or unconscionability) from *Rory* applies.

The Court of Appeals Opinion eliminates a plethora of equitable considerations normally present in real property cases. This is not a “balance” but, rather, an unnecessarily harsh elevation of contract law over real property law equitable principles – principles which are firmly rooted in this State’s jurisprudence. There is nothing offensive to contract law in applying or imposing equitable relief and/or defenses – equitable doctrine – to the written terms of the parties’ contract. In fact, by way of example, Michigan law provides as such in many instances:

1. Rescission
2. Reformation
3. Substantial Performance
4. Estoppel
5. Waiver

In other words, rescission is an available remedy despite the absence of a specific contract provision stating as much. Estoppel may be a defense even though the contract does not expressly say so. Nor is it required that a contract expressly state that time is of the essence or indemnification is provided in order for it to be true. See, for example, *Grade v Loafman*, 314 Mich 364; 22 NW2d 746 (1946) (an express provision is not necessary in order to make time of the essence of the contract; *Hill v Sullivan Equipment Co*, 86 Mich App 693; 273 NW2d 527 (1979) (implied indemnity). Rather, these are “terms” implied in every contract in order to allow equity and fairness to prevail. In fact, Michigan law permits the finding of an entire contract, implied in fact or law. *In re Lewis Estate*, 168 Mich App 70, 75-76; 423 NW2d 600 (1988). The material breach doctrine is simply “more of the same” – a legal

doctrine imposed upon contracts in order to allow equity and fairness to preclude forfeitures for trivial, inconsequential and/or non-material breaches.

In sum, enforcement of forfeiture provisions is not prohibited by Michigan common law – but, neither is it required. Therefore, contract law and the law of equitable remedies on real property law can, and should, coalesce, in the form of applying the material breach doctrine to forfeiture cases.

2. The Material Breach Doctrine Comports with Public Policy

The public policy of this State is found in the constitution, statutes and the common law. *Rory*, 473 Mich at 471, citing *Terrien v Zwit*, 467 Mich 56, 66-67; 648 NW2d 602 (2002). For more than a century, Michigan policy, in the common law, has been – **Equity abhors forfeitures**. The Court of Appeals did not consider this bedrock principle of Michigan law.

A forfeiture is not favored either at law or in equity, **and a provision for it in a contract will be strictly construed**, and courts will find a waiver upon slight evidence, when the equity of the claim made, as in this case, is, under the contract, in favor of the insured. *Young v Life Ins Co*, 4 Big L & A Ins Cas 1; *Miller v Brooklyn Ins Co*, 2 Big L & A Ins Cas 35; *Bouton v Amer ML Ins Co*, 25 Conn 542; *Phoenix Ins Co v Lansing*, 20 NW REP 22; *Crane v Dwyer*, 9 Mich 350; *White v Port Huron & M Ry Co*, 13 Mich 356; *Westchester F Ins Co v Earle*, 33 Mich 143; *People v Fire Dept of Detroit*, 31 Mich 458.

Lyon v Travelers' Ins Co, 55 Mich 141, 146; 20 NW 829 (1884) (emphasis supplied).

It is urged that equity abhors forfeitures, and that equity will not enforce a forfeiture, and petitioner is charged with being unwilling to do equity, although he is asking it. **This court not infrequently goes beyond the strict terms of the contract to enforce equities**

between parties, and an illustration of that is the recent case of *Northern Michigan Building & Loan Association v Fors*, 155 NW 736.

Tower v Detroit Trust Co, 190 Mich 670, 674; 157 NW 367 (1916) (emphasis supplied).

'A forfeiture is not favored either at law or in equity.' *Lyon v Travelers' Ins Co*, 55 Mich 141, 20 NW 829, 831, 54 Am Rep 354.

'Equity dislikes forfeitures, and not only will not aid in enforcing them, but will restrict their effect as far as possible.' *Hull v Hostettler*, 224 Mich 365, 194 NW 996, 997.

Equity relieves against forfeitures when it would be oppressive or fraudulent not to. *Curry v Curry*, 213 Mich 309, 182 NW 98; *Hubbell v Ohler*, 213 Mich 664, 181 N W 981.

Equity will not enforce a forfeiture and, hence, **will not lend its aid to divest an estate** for breach of a condition subsequent. *President, etc., of Michigan State Bank v Hammond*, 1 Doug 527.

Keyworth v Wiechers, 269 Mich 687, 698; 257 NW 755 (1934) (emphasis supplied).

If we say the reason was that the attempt to alienate that which was inalienable was penalized by its forfeiture, we say that which has no support either in the statute or common law of England. Forfeitures are not favored in law, and will not ordinarily be enforced in equity.

Dolby v Dillman, 283 Mich 609, 629-630; 278 NW 694 (1938).

[A]lthough the law permits such forfeitures, equity abhors them. The trial judge ought not be required to close his eyes to the impact of the exercise of his discretion.

Ben P. Fyke & Sons, Inc v Gunter Co, 390 Mich 649, 671; 213 NW2d 134 (1973).

'A forfeiture is not favored either at law or in equity, **and a provision for it in a contract will be strictly construed**, and courts will find a waiver upon slight evidence, when the equity of the claim made, * * * is, under the contract, in favor of the

insured.’ *Lyon v Travelers’ Insurance Co*, 55 Mich 141,
20 NW 829, 54 Am Rep 354.

Smith v Independent Order of Foresters, 245 Mich 128, 134; 222 NW 166 (1928) (emphasis supplied).

In addition, the statutory law of this State demonstrates a legislative intent to avoid forfeiture. Specifically, land contracts may be forfeited only if the breach is material. MCL 600.5726. Similarly, in the landlord-tenant context, a tenant is given the opportunity to cure even after judgment; specifically, a tenant may avoid forfeiture if the bases for forfeiture are cured at any time between the alleged breach and 10 days after entry of judgment – not simply the landlord’s demand. MCL 600.5744(1).

Majestic argues that this Court may not elevate policy concerns over the strict enforcement of the terms of the parties’ contract. However, although freedom of contract is of paramount concern and importance, where freedom of contract and public policy conflict, freedom of contract must yield to public policy. *Calif v West*, 252 Mich App 443, 452-453; 652 NW2d 496 (2002), quoting *Feldman v Stein Bldg & Lumber Co*, 6 Mich App 180; 148 NW2d 544 (1967). And, it is perhaps noteworthy to add that, consistent with *Rory*, under which contracts that violate public policy cannot be enforced, it can be argued that forfeiture of a contract based on a non-material or trivial breach violates public policy and is, therefore, unenforceable under established contract law.

That is not to say that all forfeiture clauses are void or that forfeitures must always yield to equity. It is simply a matter of allowing for the public policy of this State, that forfeitures are disfavored, to be considered and thereby allow the courts the engage in an analysis in

forfeiture cases whereby equitable considerations are given merit. The material breach doctrine provides the parameters and framework within which such an analysis may occur.

In sum, the material breach doctrine already exists under the Michigan common law of rescission. Extension of the common law of material breach to forfeiture allows for the promotion of the public policy of this State disfavoring forfeiture. Accordingly, the Court of Appeals erred by failing to consider and promote the public policy of this State to avoid forfeitures and must be reversed.

**3. The Material Breach Doctrine is a
“Traditional Contract Defense” and, Thus,
Applicable Under *Rory***

In *Rory*, this Court said that:

Only recognized traditional contract defenses may be used to avoid enforcement of a contract provision.

Rory, 473 Mich at 470. This Court followed that declaration with:

Examples of traditional defenses include duress, waiver, estoppel, fraud, or unconscionability.

Rory, 473 Mich at 470, n 23 (emphasis supplied). Relying on this language, the Court of Appeals concluded that because LWCC’s defense in this matter was not duress, waiver, estoppel, fraud or unconscionability, its defense was not a “traditional contract defense” which could be considered. COA Op, p 12, Exhibit C. The Court of Appeals’ analysis in this regard is flawed.

First, this Court's list of "traditional contract defenses" in *Rory* is expressly by way of example only. Presumably, other "traditional contract defenses" are not precluded – such as:

1. pre-existing breach of contract
2. substantial performance
3. agreement to arbitrate
4. impossibility of performance
5. frustration of purpose
6. discharge/release
7. laches
8. statute of frauds
9. statute of limitations
10. accord and satisfaction
11. failure to mortgage
12. unclean hands
13. lack of consideration
14. lack of mutual assent
15. lack of mutuality
16. set-off
17. assignment.

Thus, presumably, this Court's list of "traditional contract defenses" in *Rory* was not exhaustive and does not expressly preclude consideration of the material breach doctrine.

Second, as discussed *supra*, the material breach doctrine has been a part of this State's jurisprudence since at least 1957 when this Court adopted it in *Walker*. The "factors" discussed in *Walker* (*supra*, p 6) continue to be the focus of the material breach doctrine under Michigan law today. Accordingly, Amicus Curiae submits that the material breach doctrine falls within the rubric of "traditional contract defenses" under *Rory*. Therefore, this Court's extension of the common law such that the material breach doctrine is a valid defense against forfeiture claims is both logically and legally correct. And, the Court of Appeals' failure to recognize it as such is reversible error.

B. Policy Reasons Favor Reversing The Court of Appeals

Leases are not only contracts, but also property interests. *Adams Outdoor*, 463 Mich at 34. For that reason, consistent with the law of real property in Michigan, and in general, public policy favors, the protection of those interests.⁴ Thus, it is the policy of Michigan to not favor forfeiture and there is no Michigan precedent compelling a court to automatically declare a lease forfeiture without looking to the equities of the situation. *Smith*, 245 Mich at 134.

Further, strict enforcement of forfeitures discourages real estate investment and development and therefore negatively affects the banking and development industry, insurance

⁴ Protections include, by way of example, the statute of frauds and the availability of the remedy of specific performance due to the uniqueness of real property interests. MCL 566.106 and *Al-Oil, Inc v Pranger*, 356 Mich 46; 112 NW2d 99 (1961).

industry as well as the real estate industry. Simply put, if long-term commercial leases can be forfeited for immaterial breaches, particularly after completion of significant capital investments and long-term adherence to the material terms of the lease, no one will invest in the development of leased real property. Absent investors, property will sit vacant, will deteriorate, and will eventually be abandoned. Taxes will not be paid. Improvements will not be made. And, business will not be conducted on the premises.

Long-term ground leases with options to buy are valuable and frequently used methods of developing property. Forfeiting them for immaterial breaches, resulting in the loss of millions of dollars of investment does more than discourage this type of real estate development—it likely brings it to “a screeching halt.” By contrast, applying the material breach doctrine to commercial leases allows investors security in the knowledge that their substantial investment will not be forfeited due to an honest mistake or minor infraction. Thus, the material breach doctrine promotes real estate investment and development and should be applied by this Court to actions to forfeit commercial leases.⁵

In addition, in today’s world of sophisticated and complex business interactions, the possibilities for breach of a modern commercial lease are virtually limitless. Common sense dictates that the parties simply did not intend that every minor or technical failure to adhere to each and every lease term should result in a forfeiture. Thus, the majority of courts in the

⁵ Majestic argues that the “hysterical prognostications” of Amicus Curiae should be ignored and that the economy would better benefit from the enforcement of “bargained for remedies.” This is untrue. In actuality, potential investors and developers will not incur the risk of forfeiture for a trivial, non-material breach and simply choose to not buy, lease or develop the property.

United States have found that to justify forfeiture, the breach must be material. *Foundation Dev Corp*, 163 Ariz at 445. In fact, as noted by the Arizona Supreme Court as of 1990:

The following courts, in considering a variety of types of breaches, used materiality as a factor when deciding whether forfeiture was warranted. *Semidey v Central Aguirre Co*, 239 F 610 (PR 1917), cert denied, 243 US 652, 37 S Ct 479, 61 L Ed 947 (1917) (no forfeiture for technical breach); *Medico-Dental Bldg Co v Horton & Converse*, 21 Cal2d 411, 132 P2d 457 (1942); *Nicoli v Frouge Corp*, 171 Conn 245, 368 A2d 74 (1976); *Sinclair Refining v Davis*, 47 Ga App 601, 171 SE 150 (1933) (requiring breach "so substantial and fundamental as to defeat the object of the lease"); *University Club of Chicago v Deakin*, 265 Ill 257, 106 NE 790 (1914); *Bentler v Poulson*, 258 Iowa 1008, 141 NW2d 551 (1966); *Kohn v Babb*, 204 Kan 245, 461 P2d 775 (1969) (failure of landlord to include certain farm payments as income in accounting is not so material as to defeat the object of the parties in making the agreement); *McHugh v Knippert*, 243 SW2d 654 (Ky 1951); *Lillard v Hulbert*, 9 So2d 852 (La 1942), overruled on other grounds, *Bodman, Murrell & Webb v Acacia Found of LSU*, 246 So2d 323 (La 1971); *Charles E Burt, Inc v Seven Grand Corp*, 340 Mass 124, 163 NE2d 4 (1959); *Aniba v Burleson Sanitarium*, 229 Mich 118, 200 NW 984 (1924); *United Cigar Stores Co v Hollister*, 185 Minn 534, 242 NW 3 (1932); *Intertherm, Inc v Structural Systems, Inc*, 504 SW2d 64 (Mo 1974); *Ringwood Associates, Ltd v Jack's of Route 23, Inc*, 166 NJ Super 36, 398 A2d 1315 (1979); *Fifty States Management Corp v Pioneer Auto Parks, Inc*, 46 NY 2d 573, 415 NYS2d 800, 389 NE2d 113 (1979); *Joseph J Freed & Associates, Inc v Cassinelli Apparel Corp*, 23 Ohio St 3d 94, 491 NE2d 1109 (1986); *Barraclough v Atlantic Refining Co*, 230 Pa Super 276, 326 A2d 477, 480 (1974) (when landlord sought forfeiture because tenant had defaulted on rental payment for two months because of clerical error fifteen years into lease agreement, court stated that "[w]hen a party has honestly and faithfully performed all material elements of its obligation under a contract, but has failed to fulfill certain technical obligations, causing no serious detriment to the injured party, it would be odious and inequitable to compel forfeiture of the entire contract); *Southern Region Indus v Chattanooga Warehouse*, 612 SW2d 162, 165-66 (Tenn App 1981) (although tenant failed to literally comply with lease provision requiring that it give written

notice of desire to renew, termination not warranted when tenant has made good faith effort to comply, has not been guilty of willful or gross negligence, and landlord has not been prejudiced); *Caranas v Morgan Hosts-Harry Hines Blvd, Inc*, 460 SW2d 225 (Tex Civ App 1970); *Standard Packaging Corp v Goodrich*, 131 Vt 57, 300 A2d 541 (1972); *Bolling v King Coal Theatres, Inc*, 185 Va 991, 41 SE2d 59 (1947); *Northwestern Realty Co v Hardy*, 160 Wis 324, 151 NW 791 (1915).

Foundation Dev, 788 P2d at 1196, n 10.

Many of these jurisdictions follow the Restatement (First) of Contracts, §275 – already adopted by this Court in *Walker, supra*, or the Restatement (Second) of Contracts, §241, adopted in 1981 as an update to §275 of the Restatement (First) of Contracts. For example, in *Kiriakides v United Artists Communications, Inc*, 312 SC 271; 440 SE2d 364 (1994), the South Carolina Supreme Court, following an earlier decision of the Arizona Supreme Court, stated:

To determine whether a breach of a commercial lease is material, the Arizona Supreme Court in *Foundation Development* applied the Restatement (Second) of Contracts § 241 (1981).

Id. Section 241 provides:

In determining whether a failure to render or to offer performance is material, the following circumstances are significant:

- (a) the extent to which the injured party will be deprived of the benefit which he reasonably expected;
- (b) the extent to which the injured party can be adequately compensated [by damages] for the part of that benefit of which he will be deprived;
- (c) the extent to which the party failing to perform or to offer to perform will suffer forfeiture;

(d) the likelihood that the party failing to perform or to offer to perform will cure his failure, taking account of all the circumstances including any reasonable assurances;

(e) the extent to which the behavior of the party failing to perform or to offer to perform comports with standards of good faith and fair dealing.

We adopt these standards for determining whether the breach of a commercial lease is trivial or immaterial and apply this analysis to the facts of the case.

Kiriakides, 440 SE2d at 366-367 (emphasis supplied).

In other states, the courts have created their own unique derivative of the Restatement (Second) of Contracts, §241 to follow when evaluating the merits of commercial lease forfeiture claims. These jurisdictions do so for equitable reasons as well.

For example, in Connecticut, the Supreme Court reversed the trial court's award of forfeiture in favor of plaintiff, landlord, finding that the trial court erred "in refusing to prevent the forfeiture of the lease on equitable grounds when the lessor's loss was small, the default slight, and the hardship to the tenant great." *Fellows v Martin*, 217 Conn 57; 584 A2d 458 (1991). As noted by the Court itself, the Connecticut Supreme Court had last considered the viability of equitable defenses in summary process actions 45 years prior in *Atlantic Refining Co v O'Keefe*, 131 Conn 528; 41 A2d 109 (Conn 1945) in which it held that equitable defenses were not available in summary process actions. *Fellows*, 584 A2d at 460-461. The Court further noted, however, the need to change the "old prohibition" which arose from an "obsolete system." *Fellows*, 584 A2d at 461. Thus, the Court concluded that in nonpayment

of rent cases, equitable relief from forfeiture may be granted. The Court adopted the factors suggested by Justice Story for determining whether to grant equitable relief, stating:

The factors considered by these courts in deciding whether to grant equitable relief in nonpayment cases are those suggested by Justice Story in his learned treatise, namely, (1) whether, in the absence of equitable relief, one party will suffer a loss "*wholly disproportionate to the injury to the other party*" (emphasis added) 3 J Story, *supra*, §1728; and (2) whether the injury to the other party is reparable. See 3 J Story, *supra*; see also *Petterson v Weinstock*, 106 Conn 436, 443-44, 138 A 433 (1927). We applied a similar balancing test in two landlord-tenant cases, *Fountain Co v Stein*, 97 Conn 619, 624, 118 A 47 (1922) (a lease renewal case), and *Nicoli v Frouge Corporation, supra*, 171 Conn at 247, 368 A2d 74 (a breach of covenant case).

Fellows, 584 A2d at 463-464 (footnote omitted). Applying those considerations to the case at hand, the Court found that eviction would work a forfeiture wholly disproportionate to the injury suffered and reversed the trial court's grant of forfeiture. *Fellows*, 584 A2d at 464.

Similarly, the Hawaii Supreme Court has determined that the following factors are to be considered when ruling on a commercial lease forfeiture case:

Under *Fountain Co.*, *Car-X Service Systems*, and the Hawaii property cases cited *supra*, in order to demonstrate that they are entitled to equitable relief, Lessees would bear the burden of showing that: (1) their conduct was not intentional, willful, or grossly negligent; (2) Lessor did not rely to its detriment on Lessees' failure to give notice; (3) strict enforcement of the notice provision would result in unconscionable hardship to Lessees; and (4) within the context of the lease itself, the delay in giving notice was not unreasonably long. We now adopt the foregoing standard and hold that Lessees have met their burden.

Aickin v Ocean View Investments Co, Inc, 84 Hawaii 447, 445; 935 P2d 992, 1000 (Hawaii 1997). Applying these factors, the Court found no material breach and disallowed forfeiture.

Other states recognize a more "fluid" line of inquiry in commercial lease forfeiture cases. For example, in Iowa, the Supreme Court set the standard as follows:

The principles governing this type of case are shortly reviewed in *Bentler v Poulson*, Iowa, 141 NW2d 551, 552; 'I. This action is in equity and is governed by equitable rules. Although our cases have not said in so many words that substantial compliance with the terms of a lease will avoid a forfeiture, the language of the cases supports that statement. 'Generally equity is somewhat less strict than law in requiring performance by one who seeks to enforce a contract.' *Lautenbach v Meredith*, 240 Iowa 166, 173, 35 NW2d 870, 874. 'Equity looks to the substance rather than the form, and seeks to prevent injustice.' *Cota Plastering Co v Moore*, 247 Iowa 972, 978, 77 NW2d 475, 478. 'Moreover, many of defendants' complaints were of alleged breaches of the lease too minor to warrant its cancellation, had the same been proved.' *Weible v Kline*, 251 Iowa 255, 258, 100 NW2d 102, 104. We will view the evidence of landlord's complaints with these statements in mind.

Beck v Trovato, 260 Iowa 693, 697-698; 150 NW2d 657, 659 (Iowa 1967). Similarly, in the State of Mississippi, terminating a contract is viewed as an extreme remedy which should be granted sparingly and is not proper absent a material breach. A breach of contract is material in Mississippi, so as to warrant terminating the contract, where there is a failure to perform a substantial part of the contract or one or more of its essential terms or conditions, or if there is such a breach as substantially defeats its purpose. See, *Ladner v Rigg*, 919 So2d 100, 102 (Miss 2005). See also, *Murphy's Estate v Murphy*, 191 Wash 180; 71 P2d 6 (Wash 1937) (To justify a forfeiture for violation of condition of a lease, the violation must be willful and substantial.); *Tri-Wood Realty, Inc v Pro Par, Inc*, 373 So2d 297 (Ala 1979) (Lessee's performance in respect to its obligation under leases of apartment complexes was not so egregious as to entitle lessor to cancellation of leases.); *Champlain Oil Co v Trombley*, 114 Vt 291; 476 A2d 536


(Vt 1984) (To support a judgment of forfeiture, the breach complained of may not be trivial or technical.).

In conclusion, forfeiture of a lease is an equitable remedy, subject to equitable considerations. Equity allows "the door to swing both ways;" that is: "equity abhors a forfeiture when it works a loss, but not when it works equity, and protects the landowner against indifference and laches of the lessee, and prevents a great mischief." *Negaunee Iron Co, supra*. In this case, equity is a most valuable tool for protecting the public as a whole through the promotion of development and growth of industry and the economy. Equity should be used here to remedy the unjust result of the decision of the Court of Appeals and firmly establish in the State's jurisprudence a mechanism for the protection of commercial lease property interests and future development.

IV. CONCLUSION/RELIEF REQUESTED

For all the foregoing reasons, Home Builders Association of Michigan respectfully requests that this Honorable Court grant the Association's Motion for Leave to File Amicus Brief and reverse the Opinion of the Court of Appeals.

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A

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF LIVINGSTON

MAJESTIC GOLF, LLC,
Plaintiff,

v.

LAKE WALDEN COUNTRY CLUB, INC.,
Defendant.

Case No. 09-24146-CZ
Hon. Michael P. Hatty

OPINION AND ORDER

At a session of the 44th Circuit Court,
held in the City of Howell, Livingston County,
on the 23 day of December, 2009.

TRUE COPY
MICHAEL P. HATTY
44th Circuit Court

This action involves the alleged breach of a lease between the parties concerning the 27-hole, approximately 342-acre "Majestic at Lake Walden" golf course in Hartland Township. The defendant, Lake Walden Country Club ["LWCC"], is the tenant on 27 tee-to-fairway-to-green islands of land interconnected by easements across the plaintiff Majestic Golf, LLC's ["Majestic"] other land. The plaintiff alleges that the defendant breached the parties' lease by failing to execute a road crossing easement in favor of the plaintiff per the lease whereby the plaintiff would put road crossings and drainage or utility easements at mutually convenient locations for residential home developments surrounding the golf course. The plaintiff argues that this failure resulted in the termination of the lease and extinguished the defendant's option to purchase the property. The defendant has responded that it had not received formal notice of default under ¶ 26 of lease when it gave notice of its intent to exercise the option to buy under ¶ 17 and that it is entitled to buy the leased property for the property's fair market value, as determined by the appraisal process described in the lease.

The parties had been involved in merger negotiations to provide the plaintiff with an ownership interest in the defendant's corporation in exchange for legal title to the property since 2003. The negotiations fell apart on or around December 22, 2008, concurrent with the events giving rise to the filing of this complaint. The parties stipulated to an order for a preliminary injunction, which was entered on February 18, 2009 staying the appraisal process outlined in the lease. By stipulation dated June 5, the plaintiff filed a First Amended Complaint. Thereafter, the defendant answered and filed a counterclaim on June 26 asserting a count for specific performance to allow the option to purchase to go forward and a declaratory and quiet title count to remove certain restrictions recorded allegedly unilaterally by the plaintiff contrary to the lease. The defendant moved for summary disposition on August 27, and the plaintiff filed a counter motion for summary disposition on September 24. After one adjournment, this Court heard those motions on December 3.

The defendant's motion for summary disposition is brought under MCR 2.116(C)(8) & (10). The plaintiff's counter motion does not state which rule it moves under, so it is assumed that it moves under MCR 2.116(C)(10). A motion under MCR 2.116(C)(8) tests the legal sufficiency of the complaint. *Maiden v Rozwood*, 461 Mich 109, 119-120 (1999). All well-pleaded factual allegations are accepted as true and construed in a light most favorable to the non-movant, and judgment may be granted only where the claims alleged are so clearly unenforceable as a matter of law that no factual development could possibly justify recovery. *Id.* By comparison, a motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Id.* In evaluating a motion for summary disposition brought under this subsection, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties in the light most favorable to the party opposing the motion. *Id.* The reviewing court may

consider the substantively admissible evidence actually proffered in opposition to the motion. A mere promise to provide admissible evidence raising a genuine issue of fact is insufficient to avoid summary disposition. *Id.* Additionally, under MCR 2.116(I)(2), "[i]f it appears to the court that the opposing party, rather than the moving party, is entitled to judgment, the court may render judgment for the opposing party." *Marx v Department of Commerce*, 220 Mich App 66, 70 (1996).

The parties' cross motions for summary disposition present three primary issues. The first issue is whether or not LWCC defaulted on the lease after receiving notice of non-compliance with an obligation and an opportunity to cure that non-compliance via the Crouse letter on October 7, 2008. The second is whether, if LWCC defaulted, such default warranted termination of the lease and, by extension, termination of their option to purchase the subject property. The final issue is whether, if LWCC did properly invoke its option, either or both of the appraisals should be stricken by the Court as failing to comply with the appraisal procedures defined by ¶ 17(D) of the lease.

As to the first issue, it is readily apparent that there was a default as defined by the terms of the lease. Generally, unambiguous contracts must be enforced as written. *Bloomfield Estates Improvement Ass'n v City of Birmingham*, 479 Mich 206, 212 (2007). Paragraph 26 of the lease unambiguously states:

"Each of the following events shall be a default hereunder by Tenant and a breach of this Lease... (D) If Tenant shall fail to perform any of the agreements, terms, covenants, or conditions hereof on Tenant's part to be performed (other than payment of rent) and such non-performance shall continue for a period within which performance is required to be

made by specific provision of this lease, or if no period is so provided for, a period of thirty (30) days after notice thereof by Landlord to Tenant..."

The plaintiff alleges that the defendant breached the lease by failing to comply with ¶ 22 after withholding its consent to a requested easement. The plaintiff further states that it provided the defendant with notice of non-compliance in an October 7, 2008 letter from Frank Crouse demanding that LWCC fulfill its obligation to provide Majestic with certain easements under the lease and giving 30 days to do so. The defendant responds that the letter gave no such notice as the notice did not refer to a default or call itself a notice. Moreover, the parties were in merger negotiations and had the understanding that consent to the easement need not be provided until closing of the merger. Finally, the defendant argues that the adequacy of notice must be considered in the context of an e-mail from Crouse expressing a desire to continue to negotiate the merger.

The October 7 letter provides the requisite notice under ¶ 26. See Exhibit G to Defendant's Motion for Summary Disposition. The letter makes a definite request for consent to the easement, references the defendant's obligation under ¶ 22 of the lease, and recites the history of the request demonstrating that performance on this obligation is outstanding. Finally, the letter concludes by reiterating the request that LWCC "fulfill its obligation under the lease" and provides a time period of 30 days to do so. Paragraph 22 obligates the tenant to "permit drainage and utility easements and road crossings to be developed by Landlord on the Premises as required to permit development to occur on Landlord's Other Real Estate." The defendant had long known of the plaintiff's desire for this easement and had promised its consent ten months prior to this notice. Accordingly, LWCC had failed to perform one of the "agreements, terms, covenants, or conditions" of the lease and Majestic provided the requisite notice by

communicating that this was an outstanding obligation and requesting that the obligation be fulfilled within 30 days. LWCC did not comply with its obligation and therefore technically breached the lease.

It is inconsequential that the October 7 letter did not call itself notice or reference an existing default. As the plaintiff argues, a default did not exist until after 30 days of non-performance following the transmission of this letter. Further, the terms of the lease do not require that the notice label itself as such but require only that the landlord inform the tenant that it has not performed an obligation under the lease, which this letter did. The October 8 e-mail from Crouse to Pat Hayes and James Hile does not contextualize away the sufficiency of this notice either but rather bolsters it. Although Crouse does express a desire to continue the negotiations, he also recites in the e-mail the defendant had not fulfilled its obligation under ¶ 22 of the lease and reiterates his request that the defendant do so. Finally, the allegation that the parties had agreed to another period for performance of this consent to easement is similarly immaterial. The obligation to permit easements is stated in mandatory language, and the time of performance is only contingent upon a mutually agreeable location being chosen. The lease itself under ¶ 43 limits modification of its terms by requiring a written instrument executed by both parties. Therefore, what the parties agreed orally as to when performance would occur was irrelevant since the plaintiff had a right to demand performance under the lease.

Since a breach occurred, the next issue is whether the breach was material and permitted termination of the lease and by consequence the defendant's option to purchase the property. The language of ¶ 26 of the contract states that "[i]f any event specified above shall occur and be continuing, Landlord shall have the right to cancel and terminate this Lease, as well as all of the

right, title and interest of Tenant hereunder." A breach, as specified in the preceding language of that paragraph, occurred as already noted.

Despite the termination and forfeiture provision in the contract, the defendant urges the Court to take into account equitable considerations and find that the breach was not material since the defendant had substantially complied with the lease by consistently paying rent on time for the preceding 16 years and had invested \$6,000,000 into the development of the property. The defendant cites to *Geno Enterprises Inc v Newstar Energy USA, Inc* and proposes that prior to declaring a forfeiture under a general clause such as the one at issue, courts are instructed first to look into the equity of the situation and determine whether the claimed breach is material. *Geno Enterprises Inc v Newstar Energy USA, Inc*, unpublished per curiam opinion of the Court of Appeals, issued June 5, 2003 (Docket No 232777). In *Geno*, the Court of Appeals upheld a district court decision applying the defense of material breach to a commercial lease situation and deciding that the breach at issue was not significantly material to warrant termination and forfeiture. *Id.* at 6. The Court quoted approvingly from 49 Am Jur 2d § 339, which noted that "a lessee who has breached a covenant of the lease providing for its termination because of such breach may, under some circumstances, avoid the forfeiture of the lease through the intervention of equity, where it clearly appears necessary to prevent an unduly oppressive result..." *Id.* (emphasis in original).

The decision in *Geno* is consistent with the general rule across the country that disfavors the termination of leases and holds that "in the absence of willful and culpable neglect on the part of a lessee, a forfeiture will not be decreed for a failure to comply with the covenants of a lease..." 49 Am Jur 2d Landlord and Tenant § 236 (2009). In accordance with this rule, the Ohio appellate courts have determined that:

[e]ven when [a forfeiture or termination] provision is incorporated into the lease, equitable considerations may weigh against concluding that a lessee's conduct should result in forfeiture of a leasehold interest. 'When a party raises an equitable defense, it is the responsibility of the court to weigh the equitable considerations before imposing a forfeiture.' The responsibility exists even when, as here, a party is in default of the lease.

Takis, LLC v CD Morelock Properties, Inc, 180 Ohio App3d 243, 250-251 (2008).

This principle is generally affirmed nationwide. *See, e.g., Foundation Development Corp v Loehmann's, Inc*, 163 Ariz 438 (1990); *Collins v McKinney*, 871 NE2d 363 (Ind App, 2007); *Johnny's, Inc v Njaka*, 450 NW2d 166, 168 (Minn App, 1990).

The principle discussed in *Geno* and the foreign authorities cited above is applicable to this case, and the relative immateriality of the breach at issue does not warrant a termination of the lease and forfeiture. The considerations in determining whether a breach of a contract is material include whether the non-breaching party obtained the benefit it reasonably expected to receive, the extent to which the non-breaching party may be adequately compensated for damages for lack of complete performance, the comparative hardship on the breaching party in terminating the contract, the willfulness of the breaching party's conduct, and the level of uncertainty concerning whether the breaching party will perform the remainder of the contract.

Orioncon of Michigan v Chanetti Inc Co, 221 Mich App 341, 348 (1997).

In this case, the parties entered a 25-year lease for this property in December 1992. In October 2006, the plaintiff presented the defendant with its first easement request, noting that it was a significant request and an "essential part" of their plan. Two years later, in October 2008, the plaintiff provided notice that the defendant's obligation to provide this easement was outstanding and that it sought immediate compliance. Allegedly over misunderstanding as to

when this performance became due, the defendant did not comply, and the plaintiff sent a letter of termination on November 24, 2008. Over the 16 years prior to this incident, the defendant had always paid its rent timely. Additionally, the defendant had invested \$6,000,000 in developing the property. The plaintiff's primary benefits from the parties' bargain were the substantial income from rent over the 25-year period and the increase in value to the surrounding property that he wished to develop residentially by the defendant's development of a golf course facility and cooperation with further development. The first benefit was obtained in whole up to the time the plaintiff gave its notice of termination. The second, while impaired partly by the defendant's non-compliance with plaintiff's request, has been obtained in large part since the defendant has invested \$6 million in the development of the property. Moreover, to the extent that the plaintiff's right to a benefit has been impaired by the defendant's withholding its consent to the requested easement, it can still be obtained. Any impairment in value that occurred by the defendant's withholding the easement over the past year is compensable in monetary damages. Considering the extent of the defendant's \$6 million investment in the property and the concern that eviction would effectively put the defendant out of business as it would have no golf course to operate, the hardship caused to the defendant by termination would be substantial. It is uncertain whether the defendant's breach was willful. Finally, taking into account the defendant's past performance in paying the rent, the likelihood that LWCC will continue to pay rent on a timely basis is high. Overall, the factors weigh heavily in favor of avoiding the termination and forfeiture and continuing the lease to its full term since the defendant's breach was not material and the intervention of equity is necessary to prevent the unduly harsh and oppressive result that termination and forfeiture would work in these circumstances.

Lastly, the Court is asked to decide whether the option was validly invoked and, if so, whether the appraisals conducted have complied with the appraisal process described in ¶ 17(D) of the lease. The Court need not decide the latter issue since the option was not validly invoked. Although the plaintiff's termination of the lease was illegitimate since the breach was immaterial, the lease provides in ¶ 17(C) that "[t]he option may be exercised only if Tenant is not in default of this Lease at the time of exercise." As of November 24, 2008, the defendant was in default on the lease. The defendant has not cured that default, and its provision of the revised draft of the easement on December 11 was not sufficient to cure as LWCC still did not provide its consent to the easement. Accordingly, the option was not validly invoked, and the question of whether the appraisals were properly conducted is not ripe for decision by this Court.

In conclusion, the Court finds that the defendant defaulted on the lease after receiving the requisite notice from the plaintiff pursuant to ¶ 26 of the lease agreement. However, under the legal principles approved by *Geno* and other persuasive authority, the Court finds that termination and forfeiture are inappropriate remedies. The breach of the lease in this instance was not sufficiently material to warrant termination of the lease. Nonetheless, because the lease provides in ¶ 17(C) that "[t]he option may be exercised only if Tenant is not in default of this Lease at the time of exercise" and the defendant was in default as of November 24, 2008, the Court finds that the defendant's attempt to exercise the option was ineffective. Thus, the Court abstains from ruling on the propriety of the parties' appraisals.

In accordance with the above observations:

1. As to Count I of the plaintiff's complaint seeking an order that the defendant surrender the lease premises, the defendant's motion for summary disposition is GRANTED.

Because there is no genuine issue of material fact and the defendant's breach was not material, the plaintiff cannot succeed on that claim.

2. With respect to Count II of the plaintiff's complaint, the plaintiff's motion for summary disposition is GRANTED in part since the defendant's attempt to exercise their option to purchase was ineffective as a result of the defendant's default. However, because the defendant's breach was not material, the option has not indefinitely lapsed.
3. Consistent with this ruling, summary disposition is GRANTED in favor of defendant as to Count V of the plaintiff's complaint and in favor of plaintiff as to Count I of the defendant's counter-complaint.
4. Finally, with respect to Counts III and IV of the plaintiff's complaint, the defendant's motion is DENIED. Count III was previously disposed of by the Court in issuing a preliminary injunction, and Count IV is not germane to the instant motion.

This action will continue solely for the sake of deciding on a reasonable rental value of the property under Count IV of the plaintiff's complaint.

IT IS SO ORDERED.


Michael P. Hatty
Circuit Court Judge

12-23-09

B

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF LIVINGSTON

MAJESTIC GOLF, LLC,
Plaintiff,

v.

LAKE WALDEN COUNTRY CLUB, INC.,
Defendant.

Case No. 09-24146-CZ
Hon. Michael P. Hatty

TRUE COPY
MICHAEL P. HATTY
44th Circuit Court

OPINION AND ORDER ON RECONSIDERATION

At a session of the 44th Circuit Court,
held in the City of Howell, Livingston County,
on the 26 day of March, 2010.

On December 23, 2009, this Court granted summary disposition in favor of the defendant Lake Walden Country Club, Inc. on all claims involved in this case excluding Count IV of the plaintiff's complaint by written opinion. The plaintiff, Majestic Golf, LLC, filed a motion for reconsideration pursuant to MCR 2.119(F) on January 22, 2010, which this Court accepted as timely as the parties did not receive notice of the Court's Opinion and Order on summary disposition until early January. Majestic's motion for reconsideration presents substantially the same arguments that its briefs on the parties' motions for summary disposition addressed. Having carefully re-reviewed these arguments, the Court is not convinced that it committed palpable error in this case as required by MCR 2.119(F)(3) to mandate reversal. The Court is also disinclined to give Majestic a "second chance" as permitted by the rule. *Kokx v Bylenga*, 241 Mich App 655, 659 (2000). Consequently, the Court declines to reconsider its earlier decision with the exception of the following clarifications.

The Court reaffirms that its reliance on *Geno Enterprises v Newstar Energy*¹ and the

¹ *Geno Enterprises Inc v Newstar Energy USA, Inc*, unpublished per curiam opinion of the Court of Appeals, issued June 5, 2003 (Docket No 232777).

equitable principles contained in the Court of Appeals opinion was appropriate. Majestic argues that reliance on *Geno* contradicts the dictates of older, published Michigan case law. The Court disagrees, and concludes after its own research that, as *Geno* noted, "[t]here is no Michigan precedent compelling a court to automatically declare a forfeiture under a contract provision without looking to the equity of the situation." One established equitable principle for which there is copious persuasive authority is, as the American Jurisprudence encyclopedia records and as *Geno* cited approvingly,

"Forfeitures are not favored in equity, and unless the penalty is fairly proportionate to the damages suffered by reason of the breach, relief will be granted against a forfeiture... This is particularly true where the breach is of a covenant of minor importance, as, for example, where a tenant's default under the lease is a technical one and the tenant has duly paid rent and taxes on the property over a long period of time, has substantially complied with the other lease obligations, and offers promptly to cure the default."

The Court remains convinced that the situation described in that passage is apposite to the facts of this case.

Majestic argues that the Court's decision "re-writes the parties agreement" and is therefore unlawful. Majestic elsewhere invites the Court to "fashion an equitable solution" that is more favorable to Majestic by holding that Lake Walden's default has forever extinguished their option. The Court responds that it has not rewritten the parties' contract but has instead applied the equitable principles, adopted in Michigan law by the Court of Appeals in *Geno*, which the courts are instructed to consider in giving effect to the parties' agreement. Moreover, while Majestic invites the Court to "fashion an equitable solution" more favorable to Majestic, the Court does not have *carte blanche* power to do so and must act only on the authority, both binding and persuasive, that govern similar factual circumstances.

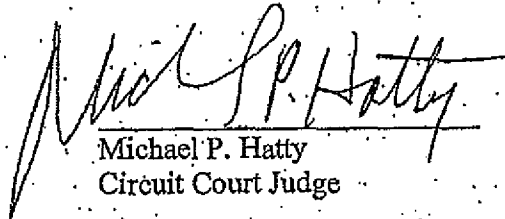
Thus, despite Majestic's invitation, the Court has no authority in this case to find that the option is extinguished because of the default. Contrary to Majestic's reading of the Lease, §17(C) states "[t]he option may be exercised only if Tenant *is not in default* of this Lease at the

time of exercise." (emphasis supplied). This provision addresses a present default, not a default that has occurred but is subsequently cured. Therefore, the Court holds that Lake Walden's option has not been extinguished completely, and Lake Walden may still exercise the option but only after the existing default has been cured.

Finally, Majestic requests the Court to clarify several procedural aspects of its ruling, and the Court will gladly acquiesce. The Court agrees with Majestic that dismissal of Count V of the complaint is without prejudice and does not adjudicate the merits of that claim. Further, the claim that Count IV would be moot if the Court ruled in the defendant's favor was not addressed by either party in their prior motions. However, with the concurrence of the plaintiff that the claim is no longer at issue, the Court will dismiss Count IV without prejudice. Lastly, Count II of the counter-complaint was partly disposed of by this Court's prior Opinion and Order to the extent that the claim requests a decision on the issues of breach and termination, though that claim does remain viable concerning the request to declare the restrictions invalid.

This order does not resolve the last pending claim and does not close the case.

IT IS SO ORDERED.


Michael P. Hatty
Circuit Court Judge

C

STATE OF MICHIGAN
COURT OF APPEALS

MAJESTIC GOLF, L.L.C.,

Plaintiff/Counter Defendant-
Appellant/Cross Appellee,

v

LAKE WALDEN COUNTRY CLUB, INC.,

Defendant/Counter Plaintiff-
Appellee/Cross Appellant.

FOR PUBLICATION

July 10, 2012

9:00 a.m.

No. 300140

Livingston Circuit Court

LC No. 09-024146-CZ

Before: WILDER, P.J., and TALBOT and SERVITTO, JJ.

WILDER, P.J.

In this case, involving a commercial real-estate contractual relationship, plaintiff appeals as of right from an opinion and order granting it summary disposition in part and denying it summary disposition in part. Defendant cross-appeals as of right from the same order. We affirm in part, reverse in part, and remand.

I. BASIC FACTS

In 1991, Waldenwoods Properties, L.L.C. ("WPL") started planning for a "golf course-real estate development" on approximately 1,400 acres of land it owned. As planned, the golf course was to be constructed on approximately 400 acres, and residential properties were going to surround the golf course. WPL planned to lease the land for the golf course ("the Golf Property" or "the Premises") to a different entity that would be responsible for constructing and operating the golf course.

On December 8, 1992, WPL (as landlord) and defendant (as tenant) entered into a lease agreement ("Lease") for a period of 25 years. The Lease contained the following relevant paragraphs:

¶ 17: **OPTION TO PURCHASE.** Tenant is hereby granted an exclusive option to purchase the Premises on the following terms and conditions:

A. The option shall be exercisable at any time during the final ten (10) years of the Lease term, excluding however the final six (6) months.

B. Exercise of the option shall be in writing, delivered to Landlord.

C. The option may be exercised only if Tenant is not in default of this Lease at the time of exercise.

D. The price shall be determined by appraisal of the fair market value of the Premises as of the date of exercise of the option, but in the condition and state they are in as of the date of executing this Lease, with the assumption they are not subject to this Lease and are restricted to golf course use.

* * *

H. Each party at its own expense shall retain an appraiser within thirty (30) days after the option is exercised. Within ninety (90) days after the option is exercised, the parties shall exchange appraisals. If the higher is no more than Ten Percent (10%) higher than the lower, the average of the two (2) shall be the purchase price. If the higher is more than Ten Percent (10%) higher than the lower, the two appraisers within thirty (30) days shall select a third appraiser who shall review the two (2) appraisals and within an additional (30) days determine the purchase price, which shall be no less than the lower appraisal and no higher than the higher appraisal. The cost of the third appraiser shall be borne equally by the parties.

* * *

K. If this Lease terminates for any reason prior to Tenant exercising its option to purchase, the option shall automatically terminate on termination of the Lease.

* * *

¶ 22: LANDLORD'S EASEMENTS AND ROAD CROSSINGS. Tenant shall permit drainage and utility easements and road crossings to be developed by Landlord on the Premises as required to permit development to occur on Landlord's Other Real Estate. The easements and crossings shall be installed by Landlord at its expense but located in areas mutually agreeable. The utilities and roads shall be installed in such a manner as to ensure that the integrity of the golf course in [sic] preserved, leaving the golf course in equal or better condition.

* * *

¶ 26: DEFAULT. Each of the following events shall be a default hereunder by Tenant and a breach of this Lease.

* * *

D. If Tenant shall fail to perform any of the agreements, terms, covenants, or conditions hereof on Tenant's part to be performed (other than payment of rent) and such non-performance shall continue for a period within which performance

is required to be made by specific provision of this Lease, or if no such period is so provided for, a period of thirty (30) days after notice thereof by Landlord to Tenant, or if such performance cannot be reasonably had within such thirty (30) day period, Tenant shall not in good faith have commenced such performance within such thirty (30) day period and shall not diligently proceed therewith to completion;

* * *

If any event specified above shall occur and be continuing, Landlord shall have the right to cancel and terminate this Lease, as well as all of the right, title and interest of Tenant hereunder.

* * *

¶ 31: NOTICES. Whenever it is provided herein that notice, demand, request, or other communication shall or may be given to or served upon either of the parties by the other, and whenever either of the parties shall desire to give or serve upon the other any notice, demand, request, or other communication with respect hereto or with respect to the Premises, each such notice, demand, request, or other communication shall be in writing and, any law or statute to the contrary notwithstanding, shall be effective for any purpose if given or served as follows:

A. If by Landlord, by mailing the same to Tenant by registered mail, postage prepaid, return receipt requested, addressed to Tenant at 4662 Okemos Road, Okemos, Michigan 48864, or at such other address as Tenant may from time to time designate by notice given to Landlord by registered mail.

At the time the Lease was originally signed, both parties anticipated the construction of the "golf-real estate development." Defendant was to develop the then-undeveloped Golf Property into 27 golf course holes, and WPL was to develop the surrounding land into residential real estate.

Defendant complied with its obligation under the Lease to construct the 27-hole golf course. Plaintiff has not yet initiated construction on the residential real estate. Defendant had paid rent in a timely manner and fully complied with all of its other obligations under the Lease until the instant litigation commenced.

According to defendant, it invested more than \$6 million in the Golf Property and has paid over \$1.6 million in rent to plaintiff. According to Frank Crouse, a manager of both WPL and plaintiff, defendant recovered its investment in the Golf Property within the first six years.

In March 2003, defendant and WPL (later, plaintiff, as WPL's successor interest, see *infra*) began merger negotiations. In the potential merger, defendant was to transfer all of its interest in the Golf Property to plaintiff in exchange for an 85 percent membership interest in plaintiff. These merger negotiations continued until the present litigation began.

On October 27, 2006, Crouse (as manager of WPL) sent a letter to Pat Hayes, defendant's president. In this letter, he discussed the status of the ongoing merger negotiations and also discussed the status of the zoning approval process for WPL's "Master Plan" for development. He listed six necessary points of agreement for a successful merger and approval of the Master Plan. The fifth point of agreement required defendant's approval of a "road easement" between holes #21 and #22 (the "Road Easement"). WPL needed defendant's approval of the Road Easement for final approval of WPL's Master Plan.

On April 3, 2007, WPL conveyed title to the Golf Property to plaintiff,¹ and plaintiff became the successor in interest to WPL's interest in the Golf Property. But WPL continued to own the land surrounding the Golf Property. On April 26, 2007, plaintiff presented to defendant a document titled "Consent to Grant of Easements." This "Consent" document was styled as a formal contract, and it included detailed maps and descriptions of the Road Easement.

On June 1, 2007, Crouse met with defendant's representatives to discuss the proposed merger and proposed Master Plan. According to the summary of the meeting, defendant reviewed plaintiff's proposed Road Easement and suggested certain changes. According to Crouse, none of defendant's suggested changes addressed the Road Easement's location.

On June 19, 2007, Crouse sent an e-mail to James Hile (a representative of defendant). The e-mail stated that he would make "the appropriate changes previously agreed to" for the Road Easement. Crouse reminded Hile that defendant's consent to the Road Easement was necessary for approval of the Master Plan.

According to Crouse, a revised version of the Road Easement was delivered to defendant on November 5, 2007, for defendant's consent. According to Crouse, the revised version incorporated some of defendant's recommended changes to the Road Easement, although the location of the easement remained the same.

The discussions between plaintiff and defendant continued and finally culminated in letter dated October 7, 2008, from Crouse to Hayes. The letter read as follows:

I am writing on behalf of both Waldenwoods Properties, LLC [WPL] and Majestic Golf, LLC to request that you execute the Consent portion of the enclosed Grant of Easement and return it to me for recording. As you will recall, Section 22 of the golf course lease obligates Lake Walden to permit road crossing easements when required by Waldenwoods for development of its adjoining land. Sometime ago Waldenwoods requested a crossing easement from Majestic Golf, which owns the golf course land. Majestic Golf approved the request, and on that basis a proposed easement between Majestic and Waldenwoods was sent to Lake Walden on April 26, 2007 for review and consent.

¹ WPL is the only member of plaintiff.

Following receipt and review of the document, you requested some changes. Those were made, and the document was resubmitted to golf course management with a request to execute the Consent. This occurred, I believe, late in 2007. Despite the request, the written Consent has not been received. Concurrence by Lake Walden is urgently required.

I am requesting that Lake Walden fulfill its obligation under the lease. Please sign and return the enclosed Consent within thirty (30) days.

The next day, on October 8, 2008, Crouse sent an e-mail to both Hile and Hayes. This e-mail stated in relevant part:

While we still very much hope that a cooperative merger will take place, we have found it necessary to prepare for the circumstance that it may not, because the differences are found to be irreconcilable. . . .

If an agreement cannot be reached, then we may be presented with a notice by Lake Walden of its intent to exercise the purchase option included in our lease. Accordingly, we are providing the following attachments.

* * *

Attachment 2—A letter requesting Concurrence by Lake Walden in the crossing easement, that has been in process since early 2007. The crossing easement has not changed – hence the legal descriptions finalized by Desine Inc.[]are dated 3/9/2007. We received approval subject to modifications to meet certain LWCC objections, and have previously asked for your concurrence, which has not been provided as is required by Section 22 of the Lease. Failure to obtain Lake Walden concurrence was a major reason why we were not able to finalize a Master Plan for our property. Now we again request that Lake Walden promptly fulfill its obligation under the lease.

* * *

We do not intend any of these items to be interpreted that we do not wish to successfully conclude a merger – as you recall, it is WPL that has attempted to have this matter continue to receive consideration. We are still hopeful that this process will be successful. [Emphasis in original.]

According to Crouse, on November 10, 2008, defendant presented plaintiff with defendant's revised merger documents. These documents continued to claim that consent to the Road Easement was contingent upon finalization of the merger. Crouse stated that these documents were unreasonably one-sided in favor of defendant.

On November 24, 2008, legal counsel for plaintiff sent a letter to defendant. This letter stated in relevant part:

The refusal of Lake Walden Country Club, Inc. to execute and deliver the Consent to the Grant of Easements sent to you on October 6, 2008 [sic – October 7, 2008] constitutes a default under the provisions of Paragraph 26 D of the Lease. On account of this default, Majestic Golf, LLC is hereby exercising its right under Paragraph 26 to terminate the Lease, effective immediately. Because of this termination, all rights granted to Lake Walden Country Club, Inc. to purchase the property pursuant to Paragraph 17 K of the Lease are also terminated, effective immediately.

On December 11, 2008, legal counsel for defendant sent a responding letter to plaintiff. Defendant's counsel stated that it was always the parties' intent to execute the Road Easement at the merger closing. He further stated that defendant was interpreting the November 24, 2008, letter as the formal 30-day notice required under the Lease. He included defendant's revised version of the Grant of Easement and concluded by stating that defendant would agree to the new terms of the Grant of Easement to comply with the Lease. The revised documents were unsigned. In fact, defendant never signed any document to consent to plaintiff's Road Easement.

On December 22, 2008, legal counsel for defendant sent another letter to plaintiff, informing plaintiff that defendant was exercising its option to purchase the Golf Property under Paragraph 17 of the Lease. Defendant stressed that, under the terms of the Lease, each party must obtain an appraisal. The parties procured appraisals, where Plaintiff's appraisal value of the Golf Property was \$800,000, and defendant's effective market value of the Golf Property was \$0.²

Plaintiff filed its First Amended Complaint on May 21, 2009. Count I sought specific performance of Paragraph 29 of the Lease, which required defendant to vacate the Golf Property upon termination of the Lease. Count II sought a declaratory order stating that defendant's attempt to exercise the option to purchase under Paragraph 17 of the Lease was invalid because the Lease had terminated before defendant's attempt to exercise the option. Count III sought a stay of the 90-day appraisal period stated in Paragraph 17 of the Lease, pending the trial court's resolution of the other issues of the case. Count IV sought a declaratory judgment and order for payment for defendant's reasonable rental value of the Golf Property during the case. Count V sought a declaratory judgment that defendant's option to purchase was void because defendant's appraisal of \$0 was submitted in bad faith.

Defendant filed its counterclaim on June 26, 2009. Count I sought specific performance of the appraisal and option to purchase provisions of Paragraph 17 of the Lease. Count II sought a declaratory order stating that (1) defendant did not breach the Lease, and (2) defendant properly exercised the option to purchase on December 22, 2008.

Defendant moved for summary disposition under both MCR 2.116(C)(8) and MCR 2.116(C)(10) on August 27, 2009. Plaintiff, without referencing a court rule, countered by moving for summary disposition on September 24, 2009.

² Defendant explains that this value was derived using the appraisal instructions in the Lease.

The trial court, while applying only MCR 2.116(C)(10), issued its Opinion and Order on December 23, 2009. It identified three issues:

The first issue is whether or not [defendant] defaulted on the lease after receiving notice of non-compliance with an obligation and an opportunity to cure that non-compliance via the Crouse letter on October 7, 2008. The second is whether, if [defendant] defaulted, such default warranted termination of the lease and, by extension, termination of their option to purchase the subject property. The final issue is whether, if [defendant] did properly invoke its option, either or both of the appraisals should be stricken by the Court as failing to comply with the appraisal procedures defined by ¶ 17(D) of the lease.

The trial court first held that defendant defaulted under the terms of the Lease. It explained that Paragraph 22 of the Lease obligated defendant to agree to the requested easements. It further explained that the October 7 Letter provided the requisite notice under Paragraph 26 of the Lease, stating:

It is inconsequential that the October 7 letter did not call itself notice or reference an existing default. As the plaintiff argues, a default did not exist until after 30 days of non-performance following the transmission of this letter. Further, the terms of the lease do not require that the notice label itself as such but require only that the landlord inform the tenant that it has not performed an obligation under the lease, which this letter did. The October 8 e-mail from Crouse to Pat Hayes and James Hile does not contextualize away the sufficiency of this notice either but rather bolsters it. Although Crouse does express a desire to continue the negotiations, he also recites in the e-mail the defendant had not fulfilled its obligation under ¶ 22 of the lease and reiterates his request that the defendant do so. Finally, the allegation that the parties had agreed to another period for performance of this consent to easement is similarly immaterial. The obligation to permit easements is stated in mandatory language, and the time of performance is only contingent upon a mutually agreeable location being chosen. The lease itself under ¶ 43 limits modification of its terms by requiring a written instrument executed by both parties. Therefore, what the parties agreed orally as to when performance would occur was irrelevant since the plaintiff had a right to demand performance under the lease.

The trial court held that, because defendant did not provide its consent to the requested easements within 30 days of receiving the October 8 letter, defendant breached the Lease.

The trial court then held that termination of the Lease was not proper under principles of equity. The trial court concluded that termination was not warranted because defendant's breach was not material. It reasoned that defendant had invested over \$6 million in the Golf Property and had paid its rent in a timely manner. The trial court also reasoned that any wrongful withholding of consent to the easement would be compensable in money damages. Thus, the trial court concluded that forfeiture of the Lease would be "unduly harsh and oppressive."

The trial court declined to address the third issue. It noted that defendant did not properly exercise the option under Paragraph 17 because it breached the Lease before its attempt to exercise the option. The trial court concluded its opinion as follows:

1. As to Count I of the plaintiff's complaint seeking an order that the defendant surrender the lease premises, the defendant's motion for summary disposition is GRANTED. Because there is no genuine issue of material fact and the defendant's breach was not material, the plaintiff cannot succeed on that claim.

2. With respect to Count II of the plaintiff's complaint, the plaintiff's motion for summary disposition is GRANTED in part since the defendant's attempt to exercise their option to purchase was ineffective as a result of the defendant's default. However, because the defendant's breach was not material, the option has not indefinitely lapsed.

3. Consistent with this ruling, summary disposition is GRANTED in favor of defendant as to Count V of plaintiff's complaint and in favor of plaintiff as to Count I of the defendant's counter-complaint.

4. Finally, with respect to Counts III and IV of the plaintiff's complaint, the defendant's motion is DENIED. Count III was previously disposed of by the Court in issuing a preliminary injunction, and Count IV is not germane to the instant motion.

On January 22, 2010, plaintiff moved for reconsideration. Plaintiff urged the trial court to reconsider its holding that equitable considerations prohibited plaintiff from terminating the Lease. Plaintiff also urged the trial court, as a procedural matter, to dismiss Count IV of plaintiff's first amended complaint without prejudice. On March 31, 2010, the trial court declined to reconsider the substance of its previous order. However, the trial court agreed to dismiss Count IV without prejudice.

On August 23, 2010, the parties stipulated to dismissal of Count II of defendant's counter-complaint, which resolved the final issue and closed the case.

II. ANALYSIS

We review de novo a trial court's decision on a motion for summary disposition brought under MCR 2.116(C)(10). *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). When deciding a motion for summary disposition under this rule, a court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence then filed in the action or submitted by the parties in the light most favorable to the nonmoving party. MCR 2.116(G)(5); *Wilson v Alpena Co Rd Comm*, 474 Mich 161, 166; 713 NW2d 717 (2006). The motion is properly granted if the evidence fails to establish a genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. *Michalski v Bar-Levav*, 463 Mich 723, 730; 625 NW2d 754 (2001).

Issues involving either contractual interpretation or the legal effect of a contractual clause are reviewed de novo. *McDonald v Farm Bureau Ins Co*, 480 Mich 191, 197; 747 NW2d 811

(2008). "When reviewing a grant of equitable relief, an appellate court will set aside a trial court's factual findings only if they are clearly erroneous, but whether equitable relief is proper under those facts is a question of law that an appellate court reviews de novo." *Id.*

A. PLAINTIFF'S APPEAL

Plaintiff first argues that the trial court improperly utilized the "material breach doctrine" in deciding whether plaintiff could invoke the forfeiture clause in the Lease. We agree.

"A contract must be interpreted according to its plain and ordinary meaning." *Alpha Capital Mgmt v Rentenbach*, 287 Mich App 589, 611; 792 NW2d 344 (2010). Where "contractual language is unambiguous and no reasonable person could differ concerning application of the term or phrase to undisputed material facts, summary disposition should be awarded to the proper party." *Id.* at 612.

The forfeiture clause is located in Paragraph 26 of the Lease and provides as follows:

¶ 26: DEFAULT. Each of the following events shall be a default hereunder by Tenant and a breach of this Lease.

* * *

D. If Tenant shall fail to perform any of the agreements, terms, covenants, or conditions hereof on Tenant's part to be performed (other than payment of rent) and such non-performance shall continue for a period within which performance is required to be made by specific provision of this Lease, or if no such period is so provided for, a period of thirty (30) days after notice thereof by Landlord to Tenant, or if such performance cannot be reasonably had within such thirty (30) day period, Tenant shall not in good faith have commenced such performance within such thirty (30) day period and shall not diligently proceed therewith to completion;

* * *

If any event specified above shall occur and be continuing, Landlord shall have the right to cancel and terminate this Lease, as well as all of the right, title and interest of Tenant hereunder.

Thus, according to the plain and unambiguous terms of the Lease, plaintiff could "cancel and terminate" the Lease if defendant failed to comply with *any* obligation (with the exception of the failure to pay rent) and that failure to perform continued for 30 days after defendant was formally notified, pursuant to Paragraph 31 of the Lease, of the failure to perform.

As we discuss in defendant's cross-appeal, *infra*, we find that there is no question of fact that the October 7, 2008, letter complied with notice requirements of Paragraph 31 of the Lease. Therefore, to avoid defaulting according to the terms of the Lease, defendant had 30 days from October 8, 2008, to cure its non-performance. The record is clear that defendant did not respond to plaintiff's letter by November 7, 2008. Therefore, under the plain language of Paragraph 26,

the default occurred on or about November 7, 2008. The trial court correctly reached this conclusion.

Defendant, however, asserts that plaintiff breached the contract first, when it recorded a document in the Livingston County Register of Deeds in February 2008. But defendant does not explain what covenant of the Lease plaintiff allegedly violated and also does not provide any authority in support of why this alleged "breach" prevents plaintiff from adhering to other aspects of the Lease. "A party may not merely announce a position and leave it to this Court to discover and rationalize the basis for his or her claims." *In re Temple Marital Trust*, 278 Mich App 122, 139; 748 NW2d 265 (2008). Consequently, we decline to consider defendant's argument.

Even though the trial court correctly found that defendant breached the Lease, the trial court refused to allow plaintiff to terminate the Lease because it concluded, under the "material breach doctrine," that forfeiture of a lease pursuant to a termination clause is not warranted where the breaching party committed an immaterial breach. We find that the trial court erred by not applying the plain language of the contract.

This Court has not, in a published opinion, addressed the applicability of the material breach doctrine in circumstances where the contract at issue contains an express forfeiture clause. Before addressing that question directly, we first note that there is a difference between "rescission," "termination," and "forfeiture" of a contract. Rescission is an equitable remedy that is used to avoid a contract. See *Alibri v Detroit/Wayne Co Stadium Authority*, 254 Mich App 545, 555; 658 NW2d 167 (2002), rev'd on other grounds 470 Mich 895 (2004); Black's Law Dictionary (9th ed).

Generally, to rescind a contract means to annul, abrogate, unmake, cancel, or avoid it. More precisely, rescission amounts to the unmaking of a contract, or an undoing of it from the beginning, and not merely a termination.

The word "termination" generally refers to an ending, usually before the end of the anticipated term of the contract. Rescission of a contract constitutes termination of that contract with restitution. On the other hand, a forfeiture, properly exercised, terminates a contract without restitution. [17B CJS, Contracts, § 585, pp 18-20 (footnotes omitted).]

In addition:

A forfeiture is that which is lost, or the right to which is alienated, by a breach of contract. *Unless there is a provision in a contract clearly and expressly allowing forfeiture*, breach of a covenant does not justify cancellation of the entire contract, and courts will generally uphold a forfeiture only where a contract *expressly provides for it*.

The declaration of a forfeiture for the breach of a condition of a contract, in accordance with a stipulation therein, is to be distinguished from a rescission of the contract in that it is an assertion of a right growing out of the contract; it puts an end to the contract and extinguishes it in accordance with its terms similarly to

the manner in which it is extinguished by performance. Forfeiture terminates an existing contract without restitution, while a rescission of a contract generally terminates it with restitution and restores the parties to their original status. [17B CJS, Contracts, § 612, pp 48-49 (emphasis added, footnotes omitted).]

In sum, “rescission” terminates a contract and places the parties in their original position, even if restitution is necessary, and “forfeiture” terminates a contract without restitution. Here, because plaintiff seeks to enforce the termination clause in the contract, we conclude that the equitable remedy of rescission is not at issue. We further conclude that, by reading the default provision of the Lease to include the term “material breach,” the trial court effectively rewrote or reformed the contract. See *Titan Ins Co v Hyten*, 291 Mich App 445, 451-452; 805 NW2d 503 (2011); Black’s Law Dictionary (9th ed).

Our view is supported by our Supreme Court’s consistent pronouncements that an unambiguous contract *must* be enforced as written unless it violates the law, is contrary to public policy, or is unenforceable under traditional contract defenses. *Rory v Continental Ins*, 473 Mich 457, 470; 703 NW2d 23 (2005); *Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 52, 62-63; 664 NW2d 776 (2003); see also *Quality Products & Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 375; 666 NW2d 251 (2003). In *Rory*, the Supreme Court stated:

This approach, where judges . . . rewrite the contract . . . is contrary to the bedrock principle of American contract law that parties are free to contract as they see fit, and the courts are to enforce the agreement as written absent some highly unusual circumstance such as a contract in violation of law or public policy. This Court has recently discussed, and reinforced, its fidelity to this understanding of contract law The notion, that free men and women may reach agreements regarding their affairs without government interference and that courts will enforce those agreements, is ancient and irrefutable. It draws strength from common-law roots and can be seen in our fundamental charter, the United States Constitution, where government is forbidden from impairing the contracts of citizens, art. I, § 10, cl. 1. Our own state constitutions over the years of statehood have similarly echoed this limitation on government power. It is, in short, an unmistakable and ineradicable part of the legal fabric of our society. Few have expressed the force of this venerable axiom better than the late Professor Arthur Corbin, of Yale Law School, who wrote on this topic in his definitive study of contract law, *Corbin on Contracts*, as follows:

“One does not have ‘liberty of contract’ unless organized society both forbears and enforces, forbears to penalize him for making his bargain and enforces it for him after it is made.” [*Rory*, 473 Mich at 469-470, quoting *Wilkie*, 469 Mich at 51-52, quoting 15 Corbin, *Contracts* (Interim ed), ch 79, § 1376, p 17. (footnotes omitted).]

Although *Rory* did not expressly decide whether a contract forfeiture clause was enforceable, it made clear that a court has no power to ignore a contract’s plain and unambiguous term because the court holds the view that the term ostensibly was “unreasonable.” *Rory*, 473 Mich at 465. *Rory* is applicable here on this very point; this Court cannot refuse to enforce the

plain and unambiguous terms of the lease herein on the basis that the forfeiture clause is "unfair." Hence, we reiterate the Supreme Court's holding that courts are not free to rewrite or ignore the plain and unambiguous language of contracts except in exceptional circumstances. *Id.* at 470.

Defendant has not established that the requisite exceptional circumstances exist in this case, sufficient to ignore the plain language of its contract with plaintiff. First, defendant makes no claim that the forfeiture provision violates the law. Likewise, we find that the forfeiture clause is not contrary to public policy.

[T]he determination of Michigan's public policy "is not merely the equivalent of the personal preferences of a majority of [the Supreme] Court; rather, such a policy must ultimately be clearly rooted in the law." In ascertaining the parameters of our public policy, we must look to "policies that, in fact, have been adopted by the public through our various legal processes, and are reflected in our state and federal constitutions, our statutes, and the common law." [*Id.* at 470-471, quoting *Terrien v Zwit*, 467 Mich 56, 66-67; 703 NW2d 23 (2002).]

While the Legislature has limited the effectiveness of express forfeiture clauses in land contracts, MCL 600.5726 (requiring the occurrence of a material breach as a precondition of forfeiture of a land contract, regardless of whether the contract has an explicit termination or forfeiture clause), notably the Legislature has not limited the operation of forfeiture clauses in other contexts. Additionally, forfeiture clauses have existed in contracts in this state for more than 100 years. See, e.g., *Hamilton v Wickson*, 131 Mich 71; 90 NW 1032 (1902); *Satterlee v Cronkhite*, 114 Mich 634; 72 NW 616 (1897). Thus, we cannot conclude that forfeiture clauses in a contract that is *not* a land contract violate public policy.

As the *Rory* Court stated, "[o]nly recognized traditional contract defenses may be used to avoid the enforcement of [legal] contract provision[s]." *Rory*, 473 Mich at 470. Such defenses include duress, waiver, estoppel, fraud, and unconscionability. *Id.* at 470 n 23. Here, the only recognized defense that could possibly be relied on, based on defendant's pleadings, is the doctrine of unconscionability. However, "[i]n order for a contract or a contract provision to be considered unconscionable, *both procedural and substantive unconscionability must be present.*" *Clark v DaimlerChrysler Corp*, 268 Mich App 138, 144; 706 NW2d 471 (2005) (emphasis added).

Procedural unconscionability exists where the weaker party had no realistic alternative to acceptance of the term. If, under a fair appraisal of the circumstances, the weaker party was free to accept or reject the term, there was no procedural unconscionability. Substantive unconscionability exists where the challenged term is not substantively reasonable. However, a contract or contract provision is not invariably substantively unconscionable simply because it is foolish for one party and very advantageous to the other. Instead, a term is substantively unreasonable where the inequity of the term is so extreme as to shock the conscience. [*Id.* (citations omitted).]

Here, there was no evidence that defendant was in a weaker position than plaintiff and was forced to accept the forfeiture term. Thus, defendant cannot establish any procedural unconscionability. We also conclude that the forfeiture clause was not substantively unconscionable. While the term undoubtedly favors plaintiff, the advantage given to plaintiff in the contract does not shock the conscience. In addition, forfeiture did not occur immediately upon defendant's breach; the Lease allowed defendant 30 days to cure any breach before the Lease would be terminated. Under these circumstances, the forfeiture clause was not "substantively unreasonable." Therefore, the forfeiture provision was not avoidable under the unconscionability doctrine.

In sum, "a court may not revise or void the unambiguous language of [an] agreement to achieve a result that it views as fairer or more reasonable." *Rory*, 473 Mich at 489. As a result, the trial court erred when it failed to enforce the forfeiture clause of the Lease based on defendant's breach not being a "material breach." As a matter of law, plaintiff successfully invoked the default provision of the Lease and terminated the Lease on November 24, 2008. Under Paragraph 17 of the Lease, the Lease's termination also extinguished defendant's option to purchase. Hence, because the Lease was terminated on that date, defendant's attempt to exercise the Lease's option-to-purchase provision on December 22, 2008, was void.

B. DEFENDANT'S CROSS-APPEAL

Defendant argues that it did not breach the contract when it failed to agree to the easement agreement. Specifically, defendant argues that (1) the easement agreement was to be finalized and executed at the conclusion of the merger negotiations, (2) the parties never reached an agreement with respect to the terms of the easement, and (3) plaintiff's October 7, 2008, letter did not comply with the notice provision of Paragraph 26. We conclude that defendant was not excused from complying with its obligation under the Lease.

Paragraph 22 of the Lease stated,

Tenant *shall* permit drainage and utility easements and road crossings to be developed by Landlord on the Premises *as required* to permit development to occur on Landlord's Other Real Estate. . . . [Emphasis added.]

Thus, defendant was required to consent to plaintiff's Road Easement. The Lease, however, did provide that the location of any easements must be "in areas mutually agreeable." As such, the only valid reason to withhold consent to the Road Easement would have been the failure to agree on a location. However, there was no evidence to show that defendant's refusal to consent was based on an objection to the location.³ We note that, during this 30-day window, defendant failed to make *any* objection or provide any rationale for its refusal to consent. Defendant's next communication was issued on November 10, 2008, which was after the 30-day deadline expired.

³ In fact, the document that defendant *provided* to plaintiff in December 2008 used the same location for the easement that plaintiff initially proposed.

Therefore, defendant's failure to consent to the Road Easement was a breach of the plain and unambiguous terms of the Lease.

Defendant also argues that consent to the Road Easement was not required because it was contingent upon finalization of the merger agreement. While the parties undoubtedly discussed that consent would occur contemporaneous to a merger, there was no evidence that the parties intended to amend, or did amend, the provision of the Lease that defendant give consent "as required."

Defendant further contends that the easement agreement was not ripe for its consent because the agreement failed to capture other conditions, such as (1) noting that all costs were plaintiff's responsibility, (2) ensuring that the integrity of the golf course would not be disturbed, and (3) ensuring that the golf course would be left in an equal or better condition when the work was complete. Nothing in Paragraph 22 makes defendant's requirements to grant an easement contingent on these asserted conditions.⁴ Thus, defendant's insistence that the Lease required these provisions in any easement agreement is without merit.

Last, defendant claims that plaintiff's October 7, 2008, letter did not satisfy the notice requirements spelled out in Paragraph 31 of the Lease. We disagree. Paragraph 31 provides, in pertinent part,

Whenever it is provided herein that notice, demand, request, or other communication shall or may be given to or served upon either of the parties by the other, and whenever either of the parties shall desire to give or serve upon the other any notice, demand, request, or other communication with respect hereto or with respect to the Premises, each such notice, demand, request, or other communication shall be in writing and, any law or statute to the contrary notwithstanding, shall be effective for any purpose if given or served as follows:

A. If by Landlord, by mailing the same to Tenant by registered mail, postage prepaid, return receipt requested

Defendant claims that the October 7, 2008, letter was deficient in several ways: (1) it was not sent via registered mail, (2) the letter did not provide any notice, and (3) the letter did not indicate what consequences would happen if the 30-day deadline was not met.

Nothing in the record supports defendant's claim that the letter was not sent via registered mail. Defendant cites to the letter itself and cites to Crouse's affidavit as evidence of the letter not being sent via registered mail. However, the letter does not identify either way how it was mailed. And Crouse states in his affidavit that he mailed the letter "consistent with notice provisions contained in the Lease."

⁴ We note that if plaintiff were to have undermined the integrity or condition of the golf course through construction or maintenance of easements, defendant would have been entitled to a variety of possible contract remedies.

Defendant's remaining claims of deficiencies are also without merit. The Lease does not require any written notice to contain any specific words, such as "notice" or "default." The letter referenced defendant's continuing obligation under Paragraph 22 of the Lease to provide the consent, explained that defendant has been delinquent for nearly a year, and established a 30-day time period to cure the defect. This 30-day time period matches the 30-day time period of Paragraph 26. Therefore, the trial court correctly concluded that the letter satisfied the notice requirements of the Lease.

Defendant's final issue on cross-appeal relates to whether its invoking of the option to purchase was invalid. As discussed, *supra*, we conclude that plaintiff properly terminated the Lease prior to defendant invoking the option, thereby making defendant's attempt to purchase void. Although the trial court concluded that defendant could not invoke the option to purchase for different reasons, we will not reverse a trial court's ruling when it reaches the right result for the wrong reason. *Coates v Bastian Bros, Inc*, 276 Mich App 498, 508-509; 741 NW2d 539 (2007).

C. CONCLUSION

In conclusion, the trial court erred when it did not interpret the Lease according to its plain and unambiguous terms. On remand, the trial court is to enter an order granting summary disposition in favor of plaintiff on its Counts I, II, and V.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction. Plaintiff, the prevailing party, may tax costs pursuant to MCR 7.219.

/s/ Kurtis T. Wilder
/s/ Michael J. Talbot
/s/ Deborah A. Servitto

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C

Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT
RULES BEFORE CITING.

Court of Appeals of Michigan.
GENO ENTERPRISES, INC., Plaintiff-Appel-
lant/Cross-Appellee,
v.
NEWSTAR ENERGY USA, INC., Defendant-Appel-
lee/Cross-Appellant.

No. 232777.
June 5, 2003.

Before: SMOLENSKI, P.J., and WHITE and
WILDER, JJ.

[UNPUBLISHED]

PER CURIAM.

*1 Plaintiff Geno Enterprises, Inc. (GEI), ap-
peals by leave granted the circuit court's affirmance
of the district court's order of judgment allowing
defendant Newstar Energy USA, Inc. (Newstar), an
opportunity to cure its breach of an oil lease and
thereby avert the issuance of a writ of restitution.
Newstar cross-appeals the determination that it
breached the lease. We affirm the court's determin-
ation to deny an unconditional judgment of posses-
sion. The cross-appeal is moot.

I

Newstar is a wholly owned subsidiary of
Newstar Resources, a publicly traded Canadian cor-
poration. Newstar is in the oil exploration business
and owns numerous wells in Michigan and other
states. Newstar is the holder of a lease giving it the
right to use certain property of plaintiff GEI to drill
for oil under Saginaw Bay.

On March 30 1999, GEI filed a complaint in
district court under the summary proceedings act,

M.C.L. § 600.5701 *et seq.*, seeking a writ of restitu-
tion removing Newstar from the premises. GEI's
complaint claimed Newstar had violated and
breached "several express covenants and provi-
sions" of the lease, that more than thirty days had
passed since Newstar had received GEI's written
notice of the violations, that Newstar was in default
under the lease, and that, pursuant to the lease,
Newstar's rights thereunder had ceased and been
terminated. Newstar's answer to GEI's complaint
included the affirmative defenses of lack of juris-
diction, waiver, laches/estoppel, and that it had paid
GEI all royalties required under the agreement, al-
though it noted that GEI returned several of those
checks in July 1999.

At the bench trial on October 13, 1999, GEI
stipulated to try three grounds for Newstar's de-
fault: failure to provide proof of liability insurance,
failure to provide proof of a \$50,000 clean-up bond,
and failure to provide seismic data relating to the
drill site. The district court found in defendant
Newstar's favor on the first two grounds, but con-
cluded (after amending its factual findings ^{FN1})
that Newstar had violated the lease by not fully
providing seismic data to GEI. The court con-
cluded, however, that Newstar's breach was not a
material breach warranting termination, and granted
Newstar additional time to comply fully with the
lease's seismic data requirement.

FN1. The district court initially concluded
that Newstar did not breach the seismic
data requirement. The court later granted
plaintiff's motion to amend findings on the
seismic data issue, noting that it had pre-
sumed, improperly, that the two Shell lines
had been drilled after the Geno I-18 well,
when in fact they were drilled before. The
court noted, however, that the amended
findings did not change its conclusion that
there was no material breach of the lease
by Newstar.

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GEI appealed to the circuit court, and Newstar cross-appealed. The circuit court affirmed the district court and dismissed Newstar's cross-appeal.

A

At trial, the evidence showed that on January 20, 1994, Florence Geno, as lessor, and Jeffrey A. Foote, as lessee, entered into a "surface lease agreement" for the use of Geno's land to drill a gas well under Saginaw Bay. Florence Geno's attorney drafted the lease. The lease was for a primary term of thirty-six months and "as long thereafter as oil and/or gas are being produced or capable of being produced in paying quantities ..."

The surface lease provided in pertinent part:

D. DEFAULT OF LEASE

*2 1. In the event Lessor shall determine a default in the performance by Lessee of any express or implied covenant of this lease, Lessor shall give notice, in writing, by certified United States mail, addressed to Lessee's last known address, specifying the facts by which default is claimed. Lessee shall have thirty (30) days from the date of receipt of such notice in which to satisfy the obligation of Lessee, if any, with respect to Lessor's notice.

K. RELEASE CLAUSE

If the Lessee fails to comply with the terms and conditions stipulated in this lease, then and in such events all of his rights hereunder shall cease and determine, and thereupon he or his assigns shall execute written release of said premises to said Lessor and his assigns.

L. ADDITIONAL PROVISIONS

2. Lessee shall provide Lessor with a copy of all title opinions, geological information (including logs, seismic, geochemistry and topographical maps) and other information regarding the lands

covered by exploration activities from the leased premises *within sixty (60) days after the completion of any well drilled from the leased premises at no cost*; provided, however, that all such data and information shall remain the sole property of Lessee and Lessor will not make the same available to third parties without prior written consent from Lessee. *This information will be provided by Lessee upon written request from Lessor.* [Emphasis added.]

Florence Geno conveyed the property and her interest in the surface lease to plaintiff GEI in January 1994. In 1995, Foote had a gas well known as "Geno 1-18" drilled from a 300 foot by 300 foot parcel of the GEI property to a bottom hole under Saginaw Bay. Foote assigned his leasehold interest to Newstar in 1997.

Wayne Geno testified at trial that GEI received and cashed royalty checks from Newstar until January 1999, totaling approximately \$302,000. Around January 1999, one of Newstar's royalty checks to GEI bounced due to insufficient funds. By letter dated January 19, 1999, GEI wrote to Newstar that it was in breach of the lease, for reasons including failure to provide seismic data under paragraph L(2) of the lease,^{FN2} quoted *supra*. Newstar responded by a letter which was dated February 18, 1999,^{FN3} but was mailed on March 3 or 8, 1999. Newstar's Michael Barratt further responded to GEI's January 19, 1999, by letter dated March 8, 1999, included with which was some seismic data.^{FN4}

FN2. Wayne Geno's letter to John Piedmonte, Newstar's president, dated January 19, 1999 stated in part:

Dear Mr. Piedmonte:

This letter is to notify you that Newstar is in breach of contract. We have not been paid in a timely manner as per the agreement to lease the surface property located in Pinconning, Michigan to oper-

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ate a gas well ... The following will need to be satisfied within thirty (30) days from this date:

1. Par B.2.-Supply all moneys due GEI immediately and all payments are to be brought up-to-date within the time frame specified above....

2. Par L.2.-All Seismic data pertaining to this well is to be supplied to GEI within ten (10) days of the issuance of this letter.

The above items are due on or before the date specified or further action will be taken.

FN3. Newstar's letter to GEI dated February 18, 1999 stated in pertinent part:

Thank you for your January 19, 1999 letter regarding the above referenced surface lease agreement. The purpose of this letter is to address your requests identified in that letter....

- All monies due to Geno Enterprises, Inc. (GEI) have been paid ...

- As you are aware, Newstar did not generate the data to support drilling the Geno 1-18 nor was it the operator during the drilling operation. Any seismic data that you requested should have been previously provided to you. I will, however, make sure copies of the seismic are provided to you. You can expect this to be delivered to you under separate cover within the next two weeks. Please be advised that pursuant to paragraph L.2 of the surface agreement, this seismic data remains the sole property of Newstar and GEI [Geno] may not make this seismic available to any third party without the prior written consent of Newstar. [Pl's trial exh 1.]

FN4. Newstar's (Barratt's) letter to Geno dated March 8, 1999 stated in part:

This letter is in response to your January 19, 1999 letter to Mr. John A. Piedmonte requesting that seismic data pertaining to this well is to be supplied to GEI.

Mr. Piedmonte responded earlier to you in his February 18, 1999 letter addressing your concerns.

Please find enclosed the portion of seismic line NS-SB-1-97 that traverses the State Fraser & Geno # 1-18 producing unit. I am also enclosing a shot point map along with the line. This is the only line which Newstar has ownership of within the unit. The portion of the enclosed line is from the Northwest end of the line to shot point 90. Shot point 90 crosses the South unit line. The bottom hole location of the St. Fraser and Geno # 1-18 is located approximately at shot point 50.

If you need additional information or have any questions regarding the seismic lines, please contact me at the above address.

By letter dated March 22, 1999, GEI's counsel informed Newstar that the lease had terminated as of February 18, 1999.^{FNS} GEI filed a summary proceedings action in district court on March 30, 1999.

FN5. The March 22, 1999 letter terminating the lease stated:

Dear Mr. Piedmonte:

We have been authorized, as attorneys for Geno Enterprises, Inc., to inform you that the surface lease agreement dated January 20, 1994 (Liber 1367, Pages 241-248) is terminated effective Febru-

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ary 18, 1999. The lease has been terminated due to the default and failure of Newstar Energy USA, Inc., to comply with the terms and conditions of the lease agreement, specifically, its failure to satisfy its obligations with respect to the notice of default dated January 19, 1999, in the following regards:

4) Failure to provide Plaintiff with a copy of geological information, including seismic data and other information regarding the lands covered by exploration activities from the leased premises within 30 days from the date of service of notice; and

5) Failure to satisfy the Lessees [sic] obligations with respect to the Plaintiff's notice within 30 days from the date of receipt of the notice.

Accordingly, on behalf of Geno Enterprises, Inc., we hereby demand immediate possession of the premises upon which the State Fraser Geno 1-18 well is located....

Pursuant to the terms of the lease agreement, it is necessary that Newstar Energy USA, Inc., vacate and remove itself, its employees, agents ... from the premises, cease any further activity on the premises, and deliver up to Geno Enterprises, Inc., possession of the premises. Furthermore, Paragraph K of the lease agreement requires that Newstar Energy USA, Inc., execute the enclosed release of said premises. Newstar Energy USA, Inc., will be considered a "holdover tenant" if it fails, refuses or neglects to comply with the terms and conditions of the lease agreement and does not immediately vacate and remove itself from the premises.

Testimony adduced at the bench trial included that seismic lines are typically run for future exploration. A map admitted at trial showed drilling units and seismic lines that had been shot in the pertinent area, and that three seismic lines were involved. The three seismic lines were about seven miles, three miles, and five miles long. Defendant Newstar ran the five mile seismic line in 1997, and provided seismic data pertinent to that line to GEI. The other two seismic lines had been run before Jeff Foote drilled the Geno 1-18 well in 1995. Shell Oil had licensed those two lines to Jeff Foote. Under licensure, the licensee is prohibited from showing the seismic lines to a third party. GEI had requested the Shell seismic data from Foote, but Foote refused because the information was li- censed.

*3 Wayne Geno testified at trial regarding the seismic data:

Q. Let's move on to seismic. Now, th-this well was drilled back in 1995, correct?

A. I believe so.

Q. And the lease is back in 1994. And the lease says that there's seismic information that-that you want within 60 days after completion of the well, correct?

A. Yes.

Q. So-so, any request in 1999 for seismic information is somewhere around four years late, correct?

A. Yes.

Q. And during that time there was never a termination notice sent sayin' 'we haven't gotten seismic and we're gonna terminate your lease'?

A. To Newstar? No.

Q. How about to Mr. Foote?

A. We requested that data from Mr. Foote, and he

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would not give it to us. I did not request a termination [of the lease from Foote].

Q. Well, isn't it isn't it correct that Mr. Foote gave you the same reason that Mr. Piedmonte stated earlier today for not giving the seismic information, and that's that it was not information that he could give to you, it was licenses?

A. It was licensed.

Q. Okay. Now it's also true about the seismic that you don't really know for sure what seismic data even pertains to this well?

A. What seismic data pertains to this well? I do not-

Q. Correct.

A. -I do not know 'cause I've not seen it.

Q. But a-as a general standpoint, you-you couldn't tell me-you know, take a map and tell me 'this is what pertains to this well and this doesn't'?

A. Probably not.

Q. Now, it's also true that-that there's been no harm to Geno Enterprises by not having that seismic data has there?

A. I believe there has because we tried to negotiate with Mich. Con earlier to do a well east of this well-

Q. So-so, the reason that there is damage to you then would be that you wanted to use this data to negotiate with somebody else?

A. No. It was -

Q. Well, ththat's what you just said.

A. It was to keep us informed of what's out there.

Q. So-so, you wanted to know what was out there so that you could negotiate with somebody else

A. For what?

Q. I don't know for what, for

A. For-for -

Q. -another well, correct?

A. -for another well east of this well.

Q. Thank you.

A. If we needed it.

B

The district court applied the material breach doctrine, concluding on the seismic issue:

8. MATERIAL BREACH IS AN EQUITABLE DEFENSE: The Defendant asserts that even if all is well with the Plaintiff's attempt to terminate the lease, the breach was not material and therefore the termination should be unenforceable. This is an equitable defense which the Court is considering pursuant to M.C.L. § 600.8302(1) & (3). ^{FN6} Section (3) states "... the District Court may hear and determine an equitable claim relating to ... or involving a right, interest, obligation, or title in land." It goes on to provide that the District Court may enter a judgment or order to effectuate its ruling. The question then becomes as a matter of law does the equitable doctrine of material breach apply to the exercise of a power to terminate contained in a lease.

FN6. MCL 600.8302(1) provides:

Sec. 8302. (1) In addition to the civil jurisdiction provided in sections 5704 and 8301, the district court has equitable jurisdiction and authority concurrent with that of the circuit court in the matters and to the extent provided by this section.

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Subsection (3) provides:

(3) In an action under chapter 57, the district court may hear and determine an equitable claim relating to or arising under chapter 31, 33, or 38 involving a right, interest, obligation, or title in land. The court may issue and enforce a judgment or order necessary to effectuate the court's equitable jurisdiction as provided in this subsection ...

*4 There are no cases involving leases on point in Michigan. The case of *Erickson v. Bay City Glass Company*, cited by the Defendant, uses the word "material," but the decision did not turn on that issue. That case held that where a power to terminate the lease does not expressly include a breach for non-payment of rent, the lease may not be terminated for non-payment of rent because the non-payment of rent provisions contained in M.C.L. § 600.5714 and M.C.L. § 554.134 are applicable.

Many cases dealing with the "material breach" issue can be found in the law of contract as it applies to the remedy of rescission [sic rescission] which is similar to the contractual remedy of termination. Many Michigan cases holding the applicability of the "no material breach" or "substantial performance" equitable defense to contract rescission [sic] may be found in West's Michigan Digest Contracts 95K261(2) (see *Omnicom of Michigan v. Giannetti Inv. Co.*, 561 N.W.2d 138, 221 Mich.App. 341, 1997). This doctrine exists to avoid harsh results when a contract has been substantially performed, the aggrieved party has received most of the agreed upon benefits, and the aggrieved party has other remedies available.

Another example of the law of contract that seeks to avoid harsh results is the doctrine holding that agreed upon damage provisions, liquidated damages, in a contract are unenforceable where they are excessive and do not reasonably relate to

damages that are likely to occur. Another example where the law of contract avoids a rescission [sic] or breach of contract is the "time is of the essence doctrine," which states unless it is otherwise specified, late performance within a reasonable time is not grounds for a rescission [sic] (see also M.C.L. § 440.616). A final example of the law seeking to avoid harsh results is found in the land contract forfeiture provisions. MCL 600.5726 expressly requires a "material breach" before a forfeiture may be declared. However, the Plaintiff on this point could argue that if the legislature wanted to require a material breach prior to the exercise of a power to terminate, it would have placed that requirement in the [summary proceedings] statute, as it did in the land contract forfeiture cases. This Court's best guess is that the equitable defense of "material breach," which seeks to avoid harsh results for minor breaches, is applicable to the exercise of a power to terminate contained in a lease especially in view of the fact that policy considerations for cancellation of contracts and cancellation of leases seem to be the same. If this legal conclusion is incorrect, this is a classic situation where hard cases make bad law.

[¶ 9. court applies the material breach/substantial performance considerations of *Omnicom, supra*.]

In considering all of the above, this Court finds that the Defendant's breach was not a material breach warranting a termination. The Defendant has performed all of its other duties under the lease, including paying the Plaintiff sums due under the lease. The Court is very reluctant to refrain from enforcing the specific terms of the lease but believes that the Plaintiff has suffered little damage, has had substantial performance, and is trying to use a relatively minor and negligent violation of the lease to terminate it. Under these circumstances, the Court believes that an immediate termination is not fair and therefore, an unconditional judgment for possession is denied. The Plaintiff however is entitled to the

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Shell lines and, therefore, is granted a judgment for possession that provides that the lease shall be terminated and a writ of restitution will issue in the event that the two Shell lines are not provided to the Plaintiff within 28 days of the judgment. *This remedy is not expressly authorized by the summary proceedings statute but is entered pursuant to MCLA 600.8302(1) & (3) [see n 7, supra].* This judgment for possession shall be processed in the same manner as any other summary proceedings judgment. In the event a higher court finds that the "material breach" defense is not applicable, an unconditional judgment for possession with a ten day writ of issuance period should be entered in favor of the Plaintiff. [Emphasis added.]

*5 The district court's order of judgment allowed Newstar time to cure its breach:

Judgment for possession is entered in favor of the Plaintiff [Geno], subject to the Defendant's right to cure the existing breach by providing two Shell seismic lines to the Plaintiff on or before September 26, 2000 (28 days after the date of this Judgment) in which case the parties lease shall not be terminated and no writ of restitution will issue.

On all other claims, judgment is entered for the Defendant [Newstar]. In the event a higher court finds that the "material breach" defense is not applicable, judgment should be entered in favor of the Plaintiff for the technical violation.

The circuit court affirmed, and dismissed Newstar's cross-appeal. Post-trial, Newstar purchased a license for the two Shell lines' seismic data and provided that data to GEI, in compliance with the district court's judgment.

II

Whether the doctrine of material breach may be applied in a summary proceedings action involving a lease is a question of law this Court reviews de novo. *Omnicom of Michigan v. Giannetti Investment Co.*, 221 Mich.App 341, 348; 561 NW2d 138

(1997). The trial court's factual findings will not be overturned unless clearly erroneous. *Id.*

A

GEI is correct that the material breach doctrine arises in rescission cases, and that rescission is not the same as forfeiture, the latter of which is the theory plaintiff advanced in this action:

§ 450. Provisions for forfeiture

A forfeiture, is that which is lost, or the right to which is alienated, by a breach of contract. Unless there is a provision in a contract clearly and expressly allowing forfeiture, breach of a covenant does not justify cancellation of the entire contract, and courts will generally uphold a forfeiture only where a contract expressly provides them. The declaration of a forfeiture for the breach of a condition of a contract, in accordance with a stipulation therein, is to be distinguished from a rescission of the contract in that it is an assertion of a right growing out of it. It puts an end to the contract and extinguishes it in accordance with its terms similarly to the manner in which it is extinguished by performance. Forfeiture terminates an existing contract without restitution, while a rescission of such contract terminates it with restitution and restores the parties to their original status. [17B CJS, Contracts, § 450, pp 66-67.]

There are no Michigan cases addressing the question whether the material breach doctrine, applicable in rescission cases, may be applied in a summary proceedings action to declare a lease forfeited. Nevertheless, we conclude that the court did not err in applying the doctrine in the instant case.

There is no Michigan precedent compelling a court to automatically declare a forfeiture under a contract provision without looking to the equity of the situation. See 49 Am Jur 2d, Landlord and Tenant, § 339, "Equitable Relief From Forfeiture," which states in pertinent part:

*6 Forfeitures are not favored in equity, and un-

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less the penalty is fairly proportionate to the damages suffered by reason of the breach, relief will be granted against a forfeiture where the lessor can, by compensation or otherwise, be placed in the same condition as if the breach had not occurred. Thus, equitable relief against forfeiture of a lease is generally granted in all cases of nonpayment of rent if such payment is delinquent made or tendered, unless there is some ground for denying such relief, and relief against forfeiture of a lease is generally granted in cases other than those for nonpayment of rent, where the grounds for relief are fraud, accident, or mistake. *Like-wise, a lessee who has breached a covenant of the lease providing for its termination because of such breach may, under some circumstances, avoid the forfeiture of the lease through intervention of equity, where it clearly appears necessary to prevent an unduly oppressive result, or to prevent an unconscionable advantage to the lessor ... This is particularly true where the breach is of a covenant of minor importance, as, for example, where a tenant's default under the lease is a technical one and the tenant has duly paid rent and taxes on the property over a long period of time, has substantially complied with the other lease obligations, and offers promptly to cure the default.*

Equity may also relieve a lessee from a default in breaching a covenant of the lease where the lessor's right to cancel the lease has been waived. [49 Am Jur 2d, *supra* at pp 304-305. Emphasis added.]

Applying these principles, we find no error. There was evidence that Newstar had a substantial investment in the property, had otherwise complied with the lease, and that GEI could be made whole.

B

GEI also argues that M.C.L. § 554.46 implicitly rejects application of the material breach doctrine in forfeiture actions where the breach is not nominal, and since the lower courts in the instant case both concluded Newstar's breach was not nom-

inal, the court's rulings violated the clear intent of the standard imposed by the Legislature.

MCL 554.46 provides:

When any conditions annexed to a grant of conveyance of lands are merely nominal and evince no intention of actual and substantial benefit to the party to whom or in whose favor they are to be performed, they may be wholly disregarded, and a failure to perform the same shall in no case operate as a forfeiture of the lands conveyed subject thereto.

MCL 554.46 does not set the upper limit of any threshold, but rather sets a minimum threshold. See M.C.L. § 600.5744(6), which provides that a land contract forfeiture clearly requires a material breach.

III

Although we have determined that the district court did not err in permitting Newstar to avoid the forfeiture by providing the seismic data, and Newstar's cross appeal is therefore moot, Newstar having provided the data, we nevertheless address one aspect of the cross-appeal as an alternative basis for affirming the trial court's denial of an unconditional judgment of possession. We conclude that the trial court erred in rejecting Newstar's claim that GEI waived its right to declare a forfeiture for failure to provide the seismic data.

*7 The Supreme Court in *Van v. Zahorik*, 460 Mich. 320, 336; 597 NW2d 15 (1999), stated the requirements for equitable estoppel:

Equitable estoppel arises where a party, by representations, admissions, or silence, intentionally or negligently induces another party to believe facts, the other party justifiably relies and acts on that belief and the other party will be prejudiced if the first party is allowed to deny the existence of those facts.

See also 49 Am Jur2d, Landlord and Tenant, §§ 328, 329, pp 295-296, which states in part:

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Forfeiture of leases is not favored, and the courts will readily adopt any circumstances that indicate waiver of forfeiture.

The existence of a waiver of the right to terminate a lease is a question of fact for determination by the trier of fact. The right of forfeiture may be waived either expressly or by the lessor's conduct. Generally, any act by a landlord which affirms the existence of a tenancy and recognizes the tenant as the lessee, including the failure to exercise the remedy of forfeiture, after the landlord has knowledge of a breach results in the landlord's waiver of the right to a forfeiture. Thus, a lessor's conduct constitutes a waiver of the right to enforce a forfeiture where, after a fire, the lessor commences restoration of the premises and fails to communicate to the lessee the intention to rely upon a lease term providing for termination in the event of fire.

No waiver occurs, however, where the lessor acts promptly to terminate the lease upon learning of the lessee's breach of a covenant....

§ 329. Delay in declaring forfeiture; consent to, or acquiescence in, breach

... where ... a lessor delays unreasonably in declaring a forfeiture of a lease the forfeiture is deemed to have been waived.

A lessor who consents to acts of the lessee which otherwise would constitute ground for a forfeiture will not be permitted to enforce a forfeiture, because there is in such a case no breach by the lessee.

In the instant case, plaintiff GEI delayed for years before requesting seismic data or enforcing a forfeiture on the basis of the seismic data requirement. The Geno 1-18 well was drilled in 1995 by Foote. The lease provision stated both that the data was required to be provided within sixty days after the completion of any well drilled, and that the data will be provided upon written request from the

lessor. GEI requested the seismic data from Foote, but he refused to provide it because it was under license, and the matter was not pursued. Foote assigned his interest in the lease to Newstar in 1997, after the data was due under lease, after it had been requested and denied, and after GEI waived its right to declare a forfeiture based on that denial. GEI first requested the seismic data from defendant Newstar in January 1999. Newstar is correct that the district court did not address plaintiff's conduct before it sent Newstar the termination letter in January 1999, as evidenced in the district court's opinion:

*8 7. EQUITABLE ESTOPPEL/WAIVER: The Court finds that the Plaintiff *at all times from January 19, 1999* conducted itself in a manner that was consistent with terminating the lease. The original 30 day notice of default threatened further action if the alleged breaches were not cured. The Plaintiff did send a termination notice in March, although it was not required to do so. Shortly thereafter, the Plaintiff commenced a summary proceedings action to have the Defendant removed from the premises. The Court cannot find any conduct on the part of the lessor that would constitute a waiver of the exercise of the power to terminate the lease. In addition, any theory of estoppel is not supported by the facts since the Plaintiff did not engage in any conduct that would have caused the Defendant to take a position or action in reliance on representations or conduct it may have engaged. [Emphasis added.]

Notwithstanding the trial court's observations concerning GEI's conduct after January 19, 1999, prior to that date GEI very clearly waived its right to forfeit the lease based on the failure to provide seismic data relating to the Geno 1-18 well, drilled in 1995, and led Foote and Newstar to believe that it did not read the lease as requiring the production of seismic data that was subject to license.

We affirm the court's determination to deny an unconditional judgment of possession. We grant no relief on the cross-appeal because Newstar has

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already complied with the terms of the conditional
judgment.

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